SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 736.

EUGENE A. FREUND AND ALFRD F. ROMMICH, APPELLANTS,

vs.

THE UNITED STATES.

No. 771.

THE UNITED STATES, APPELLANT,

vs.

EUGENE A. FREUND AND ALFRD F. ROMMICH.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

Court of Claims.

EUGENE A. FREUND AND ALFRED F. ROEMMICH.
vs.
THE UNITED STATES.
No. 33855.

I. Petition and amended petition.

On September 28, 1917, the claimants filed their original petition. Subsequently, to wit, on July 26, 1919, by leave of court, the claimants filed their amended petition. Said amended petition is as follows:

Amended petition.

(Filed July 26, 1919.)

To the Honorable Chief Justice and Judges of the United States Court of Claims:

Eugene A. Freund and Alfred F. Roemmich, claimants herein, respectfully represent:

1. That they are citizens of the United States and at all times hereinafter mentioned were members of a partnership known by the firm name of "Freund & Roemmich," with offices in the city of St. Louis and State of Missouri, and that said partnership was formed for the purpose of engaging in the service of collecting and transporting the mails of the United States under contract with the Government.

2. That on or about the 21st day of February, 1911, the defendant, acting through its Post Office Department, submitted to the said Freund & Roemmich a bulletin advertisement intending that
2 the same should be used by the said Freund & Roemmich as a basis upon which to prepare a bid upon the service to be performed on mail service route No. 445,004 in the city of St. Louis, Missouri, which said bulletin advertisement provided for service to be rendered upon seven (7) specific circuits on said mail service route, each of which circuit was designated in said bulletin advertisement to begin and end at the new post office building then in the course of construction, at Seventeenth Street and Clark Avenue, near the Union Depot; and which said bulletin advertisement also specified the number of stops required on each trip for the receipt of mail collections from carriers, the number of trips and miles of travel required on each day of each week, including Sundays and holidays, together with the length of time allotted for each trip; that a copy of said bulletin advertisement of February 21, 1911, is attached to the original petition herein marked claimants' exhibit "A," and by this reference is made a part of this amended petition.

3. That said bulletin advertisement of February 21, 1911, further provided that "any additional information concerning the same can be obtained by calling upon the postmaster." That after examining said bulletin advertisement and after inspecting the circuits therein

designated, claimants did accordingly call upon the then duly qualified and acting postmaster in the city of St. Louis, and received oral and written information from him upon which they relied in figuring their bid upon said route; that the said postmaster gave them oral estimates as to the weight of the mails which they would be required to haul upon each trip on the circuits of said route; that they were informed by the postmaster that no service would be required
3 upon said route until the service called for in said bulletin advertisement upon which they were to figure their bid was ready to be performed, and that said service would not be ready until the new post office building should be completed; that said postmaster also furnished them with a supplement to said bulletin advertisement, which set forth the service to be performed upon said route and upon each of the seven circuits thereof with much greater detail than in said bulletin advertisement, showing again the number of circuits or routes upon said mail route No. 445,004, the beginning and ending of each such circuit at the new post office building, the hour when such service should begin and end each day on each such circuit, the number of miles to be traveled upon each trip and the length of time required for each trip, said supplement conforming in all respects to said bulletin advertisement; that a copy of said supplement is attached to the original petition herein, marked claimants' Exhibit "B," and by this reference is made a part of this amended petition.

4. Whereupon, claimants herein, relying upon the information set forth in said bulletin advertisement, prepared and submitted by the Post Office Department at Washington, as aforesaid, and the said supplement thereto prepared and submitted by the Postmaster at St. Louis, and relying also upon the said oral information given to them by the Postmaster at St. Louis pursuant to instructions set forth in said bulletin advertisement, on or about the — day of February, 1911, prepared and submitted to the Post Office Department at Washington, D. C., a sealed bid by which they agree to perform the service specified in said bulletin advertisement of February 21, 1911, for a certain price; that, on or about March 23, 1911,
4 they were advised by the Post Office Department at Washington that all bids for said service had been rejected, but that the Post Office Department was desirous of having new bids submitted upon the aforesaid service, which service was again set forth in a second bulletin advertisement, enclosed with said letter, dated March 21, 1911, said second bulletin advertisement being in the same terms, as to the nature and character of the work to be performed, as the aforesaid bulletin advertisement of February 21, 1911, and claimants say that they also received the assurance of the Postmaster at St. Louis that the service called for in said second bulletin advertisement was exactly the same as that specified in said first bulletin advertisement.

5. Claimant further says that, upon receipt of the aforesaid notice and request for new bids, and said second bulletin advertisement, they

took up the question of submitting a second bid upon said service with the Postmaster and Assistant Postmaster at St. Louis, Missouri, especially with reference to their being required to begin work on the circuit service described therein on July 1, 1911, as specified in both of said bulletin advertisements, calling the attention of said officials to the fact that it would be necessary for them to have the automobile equipment, called for in said bulletin advertisement, manufactured for purpose, and that it would be impossible for them to obtain the same by July 1st, 1911; that said Post Office officials at St. Louis again assured claimants, as said officials had done prior to the submission of their first bid, that claimants would not and could not be called upon by the department to perform the service specified
5 in said bulletin advertisement of March 21, 1911, until the new Post Office building was ready for occupancy and use, as the circuit service specified in said bulletin advertisement was predicated on the use of said new Post Office building, and because said new Post Office building could not possibly be made ready for use for several months; that, relying upon these representations and assurances of the Department's agents, the Postmaster and Assistant Postmaster at St. Louis, claimants, on the 4th day of April, 1911, prepared and submitted to the Post Office Department of the United States at Washington another bid, in which they offered and agreed to perform the service called for in the said second bulletin advertisement, dated March 21, 1911, on said seven circuits, beginning and ending at said new Post Office building for the sum of twenty-one thousand five hundred sixty-three dollars and thirty-three cents ($21,563.33) per annum, said bid being made, as expressed therein, upon the basis that mails were to be carried a distance of sixty-seven thousand nine hundred and sixteen (67,916) miles each year upon said route, as provided in said bulletin advertisement, and they were to receive thirty-one and three-fourths cents (31¾¢) for each mile traveled by their automobiles over said circuits. That a copy of said bid is attached to the original petition herein marked claimants' Exhibit "C," and by this reference is made a part of this amended petition.

6. Claimants further state that the said bid was by defendant, through its Post Office Department, duly accepted, and that said department did in due time prepare a contract pursuant thereto, which said contract, as prepared by said defendant, was, on the 22nd day of May, 1911, signed by the claimants herein and on the
6 26th day of May, 1911, said contract was signed, sealed, and delivered by a duly authorized officer and agent of the said Post Office Department; that said contract provided that claimants should perform the service and transport the mails on route No. 445,004, as provided in said second bulletin advertisement of March 21, 1911, which said bulletin advertisement was made a part of said contract, and said contract further provided that claimants should perform such additional service of the same kind or kinds as that provided for in said bulletin advertisement as might be re-

quired by said department and to perform all new and additional services to and from other like points not named in said bulletin advertisement as the Postmaster General might direct during the contract term, and said contract further provided that "the pay of the contractors shall be increased or decreased as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel based on the frequency and distances shown in the schedule of service for said route in said advertisement," a copy of which said contract is attached to the original petition herein, marked claimant's Exhibit "D," and by this reference is made a part of this amended petition.

7. Claimants further state that said new post-office building was not completed and ready for occupancy and use on July 1, 1911, as contemplated by the terms and provisions of said contract, and because thereof the circuit service specified therein and in said bulletin advertisements was not ready on said date; and claimants further state that said new post-office building was not completed and ready for occupancy and use, and said circuit service for which
7 they had contracted to render was not ready until long after claimants had obtained the necessary automobile equipment and were otherwise fully prepared to perform said service; that nevertheless, claimants say, the defendant, through its said Post Office Department and the officers and agents thereof, on or about June 30, 1911, issued an order purporting to restate the service on said route No. 445,004 effective July 1, 1911; that said order was set out in an official letter written by the Second Assistant Postmaster General of the United States dated June 30, 1911, and addressed to the Postmaster at St. Louis, Missouri; that a copy of said order and letter is attached to the original petition herein marked claimants' Exhibit "E," and by this reference is made a part of this amended petition; that pursuant to the receipt of said letter and order dated June 30, 1911, the postmaster in St. Louis, acting under authority vested in him by virtue of his said office and as an officer, agent, and representative of the defendant, formulated and prepared a supplemental schedule in conformity with and setting forth in detail the service required on said route No. 445,004 as set forth in said order of June 30, 1911, made by the Second Assistant Postmaster General as aforesaid; that a copy of said supplemental schedule is attached to the original petition herein, marked claimants' Exhibit "F," and by this reference is made a part of this amended petition.

8. Claimants further state that the service required by said substituted schedule prepared pursuant to said order of the Second Assistant Postmaster General, restating the service upon said route No. 445004 as aforesaid, was not the service contemplated by the terms and provisions of said contract, and was not a service
8 of the same kind or kinds as that contemplated by the terms and provisions of said contract and said bulletin advertise-

ment of March 21, 1911, but was a service entirely different from and far more onerous and expensive than the service therein provided for, and said substituted schedule provided for a compensation far less remunerative than that provided for in said contract.

9. Claimants further state that under the provisions of said substituted schedule prepared pursuant to the order of the Second Assistant Postmaster General dated June 30, 1911, restating the service upon said route, each of the seven circuits provided for in said bulletin advertisement were abolished, and that instead of being required to perform a circuit service collecting and distributing mail in a small section of St. Louis, averaging from 10 to 15 tons daily, requiring only from ten to twelve hours a day for its performance, for which they were to be paid a specified compensation for each mile traveled, they were required to perform a single trip service and to make numerous single trips each day to and from the old post office at Eighth and Olive Streets and certain other mail stations in the city of St. Louis to meet incoming and outgoing mail trains at the Union Station in said city, and transport and carry all incoming and outgoing mails for the entire city of St. Louis and its outlying suburbs, the same averaging from 100 to 115 tons daily, and requiring a much larger equipment and much more help and labor than the circuit service contracted for as aforesaid, and also requiring about 22 hours daily for its performance; and claimants say that said order of the Second Assistant Postmaster General of June 30, 1911, promulgating such substituted service, fixed their compensation for such substituted service, notwithstanding
9 it was so much more onerous and expensive than the circuit service contracted for by them as aforesaid, at a less sum per annum than that specified in their said contract for said circuit service, namely, at $18,265.61 per annum, on the theory that said substituted service required only 57,679.60 miles of travel per annum (no compensation whatever being allowed for the mileage traveled in going to points of beginning, or in returning from destination, upon said trips), and said amount of $18,265.61 was held by the Post Office Department to be a proper pro rata (on a mileage basis) of the compensation stipulated for in their aforesaid contract for said circuit service under which, as stated, claimants were to be compensated for each and every mile traveled in performing said service.

10. Claimants further state that they objected and protested to the defendant and its agents, including said Second Assistant Postmaster and the postmaster and assistant postmaster at St. Louis, Missouri, against being required to perform said substituted service, upon the ground that said substituted service was not the service required, or authorized to be imposed upon them, by their aforesaid contract for said circuit service, but nevertheless the defendant, through its officers and agents, ordered and directed claimants to undertake and perform said substituted service, and threatened said claimants with the forfeiture of the bond given by them for the

faithful performance of their said contract if they did not perform such substituted service, whereupon claimants undertook to and did perform said substituted service, under protest, from the 1st day of July, 1911, until the 27th day of October, 1912, upon which latter day
(said new post office building at 17th Street and Clark
10 Avenue having been completed), the circuit service starting
from said new post office and ending thereat—upon which claimants had bid and for which they had contracted as aforesaid—was put into effect and was thereafter performed by claimants as they had agreed.

11. Claimants further state that the circuit service for which they had contracted as aforesaid, and upon which they entered on October 27, 1912, netted them an annual profit of 33⅓ per cent upon the cost of said service, whereas said substituted service which they were required to perform, under protest and coercion as aforesaid, at the rate allowed therefor by the Post Office Department, gave them no profit whatever, but caused them great pecuniary loss.

12. Claimants further say that the reasonable value of services rendered by them, as aforesaid, under and pursuant to said terms of said substituted schedule, from July 1, 1911, to October 27, 1912, was fifty-eight thousand three hundred and two dollars and fifty-two cents ($58,302.52); that for the services so rendered these claimants have had and have received from the defendant through its Post Office Department, the sum of twenty-four thousand two hundred eighty-nine dollars and sixty-two cents ($24,289.62); that there is still due to these claimants on account of the services so rendered the sum of thirty-four thousand and twelve dollars and ninety cents ($34,012.90); the payment of which said sum the claimants herein have demanded of the defendant but which the defendant has refused to pay.

13. Claimants further state that on the 12th day of December, 1913, a relief bill was introduced in their behalf in the House of Rep-
resentatives in the 63rd Congress of the United States,
11 providing for an appropriation out of the Treasury of the
United States in the sum of twenty-five thousand dollars ($25,000); that said bill was referred to the Committee on Claims, which said committee, after a hearing, reported said bill back to the House with a recommendation that the Secretary of the Treasury be authorized to pay the claimants the sum of eighteen thousand nine hundred seventy-eight dollars and thirty-two cents ($18,978.32); that said bill as amended by the committee remained upon the House calendar without coming to a vote until the final adjournment of the 63rd Congress.

14. Claimants further state that on the 10th day of December, 1915, a bill was introduced on behalf of claimants into the House of Representatives of the 64th Congress of the United States, providing for an appropriation out of the Treasury of the United States in the sum of eighteen thousand nine hundred seventy-eight dollars and thirty-two cents ($18,978.32); that said bill was referred

to the Committee on Claims, which said committee reported said bill back to the House with a recommendation that the Secretary of the Treasury be authorized to pay to claimants the said sum of eighteen thousand nine hundred seventy-eight dollars and thirty-two cents ($18,978.43); that said bill as reported by the committee remained upon the House calendar without coming to a vote until the final adjournment of the 64th Congress.

15. Claimants further state that they have not assigned said claim or any part thereof or interest therein; that the claimants and each of them have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Gov-
12 ernment; that said claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; and that they believe the facts as hereinabove stated to be true.

Wherefore, claimants pray that judgment be entered in their behalf and against the defendant for a total sum of thirty-four thousand and twelve dollars and ninety cents ($34,012.90), together with the costs laid out and expended by them in the prosecution of this suit, as provided by the statute (sec. 152, Judicial Code).

EUGENE A. FREUND,
ALFRED F. ROEMMICH,
Claimants.

By WILLIAM R. HARR,
CHARLES H. BATES,
Their Attorneys, thereunto duly authorized.

HARR & BATES,
Attorneys for Claimants.

(Power of attorney annexed.)

13 CITY OF WASHINGTON, } *ss.*
DISTRICT OF COLUMBIA. }

The undersigned, first being duly sworn, deposes and says that the statements made and the facts set forth in the foregoing petition are true and correct to the best of his knowledge and belief.

CHARLES H. BATES.

Subscribed and sworn to before me on this the 26th day of July, 1919.

My commission expires
[SEAL]

ALBERT C. WEST,
Notary Public.

14 II. *General traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and submission of case.*

On November 9, 1920, this case was argued by Mr. William R. Harr, for the plaintiffs, and by Messrs. Joseph Stewart and J. Robert Anderson, for the defendant, and submitted.

15 IV. *Findings of fact, conclusion of law, and opinion of the court by Downey, J. Entered December 13, 1920.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

Claimants are citizens of the United States and at all times hereinafter mentioned were members of a partnership known by the firm name of "Freund & Roemmich," with offices in the city of St. Louis and State of Missouri, said partnership having been formed expressly for the purpose of engaging in the service of collecting and transporting the mail of the United States under the contract with the Government referred to herein.

II.

The defendant's Post Office Department having advertised in a newspaper published in the city of St. Louis, Mo., for bids for certain screen-wagon mail service in said city, the plaintiffs called on the postmaster of said city and were furnished a bulletin advertisement calling for bids for screen-wagon or automobile service in said city upon mail route No. 445004, a copy of which bulletin advertisement is attached to plaintiffs' original petition herein marked "Claimants' Exhibit A." It was stated therein that decision would be announced on or before March 21, 1911. The service contemplated thereby was a circuit service on a mileage basis over seven circuits, starting from the new post office, then being built but not completed, said service to commence July 1, 1911, and the bulletin stated that "Any additional information concerning the same can be obtained by calling upon the postmaster."

III.

Plaintiffs called several times on the postmaster and assistant postmaster for the purpose of obtaining further detailed informa-
16 tion about the contemplated service, were furnished at one time a schedule giving the number and hours of the trips and the estimated mileage per day, and were advised that the new post office would not be completed by July 1, and therefore the contem-

plated service could not commence at that time. Plaintiffs also procured information as to the probable amount of mail to be handled in order to determine whether it could be carried in the required equipment, made tests as to the correctness of the stated mileage to be covered, and, after being fully advised as to the nature and the amount of the service, submitted, on or about March 10, 1911, a bid for said service on a mileage basis.

IV.

On March 21, 1911, plaintiffs were advised by a letter from the postmaster that all bids had been rejected and that he had been instructed to invite bids on routes numbered 1 to 7 known as routes 445,004 and 445,004-A, to be submitted to the Second Assistant Postmaster General not later than 4.30 p. m., April 6, 1911, said letter also stating that "A copy of the request for bids is transmitted herewith," and inclosed therewith was the following:

Route No. 44500[illegible]. (Mileage basis)—Regulation screen-wagon service at St. Louis, Mo.—Mail-station service.

From—	By—	To—	Distance.	Number of trips daily except Sunday (306).	Number of trips on Sunday.	Total number of trips holidays (7).	Running time.
			Miles.				*Min.*
Circuit No. 1: Post office (new site).	Central Station (old post office).	Post office (new site) and 4 stops per trip en route to receive mail collections from letter carriers.	2.00	23	5	5	25
Circuit No. 2: Post office (new site).	Cupples and Merchants stations.	Post office (new site) and 1 stop per trip en route to receive mail collections from letter carriers.	2.60	9	5	5	30
Circuit No. 3: Post office (new site).	Progress and Bridge stations.	Post office (new site) and 7 stops per trip en route to receive mail collections from letter carriers.	3.00	9	5	5	30
Circuit No. 4: Post office (new site).	Cupples and Merchants stations.	Post office (new site) and 6 stops per trip en route to receive mail collections from letter carriers.	2.80	11	0	0	30
Circuit No. 5: Post office (new site).	Merchants and Central (old post office) stations.	Post office (new site) and 2 stops per trip en route to receive mail collections from letter carriers.	2.80	11	0	0	30
Circuit No. 6: Post office (new site).	Bridge and Progress stations.	Post office (new site) and 2 stops per trip en route to receive mail collections from letter carriers.	3.00	11	0	0	30
Circuit No. 7: Post office (new site).	Progress Station.	Post office (new site) and 5 stops per trip en route to receive mail collections from letter carriers.	2.20	11	0	0	30

17 "The contractor for service on this route will be required to begin service on the first day of the contract term (July 1, 1911), with not less than two No. 2 and four No. 3 wagons, or six motor wagons, each of a carrying capacity of not less than 1,500 pounds, and to retain this equipment for use in service on this route unless otherwise ordered by the department; but the department reserves the right to require the contractor to furnish at any time during the contract term such additional equipment as may be necessary for a prompt and efficient service.

"Bond required with bid, $25,000.

"Present annual pay for wagon service under existing contracts, routes No. 445,004, $21,785, and No. 445,007, $1,40. (See paragraph 15, Instructions to bidders.)

"(The above statement does not show the service as performed for any particular period, but shows the service that it is thought will be necessary at the beginning of the contract term. The service that may be required between the points named will not be limited, however, to the number of trips named, if a greater number becomes necessary.)

"NOTE.—It may be necessary to either increase or decrease the trips as shown in the foregoing statement, and to include service to and from other like points not named in said statement, or to discontinue service to and from or between points named. When additional service or increased trips become necessary for any reason, the facts must be reported to the department by the postmaster and authorization obtained from the Second Assistant Postmaster General before the same can be put into operation, except where additional trips become necessary in an emergency, when the postmaster may require the same of the contractor for such time as may be necessary, not exceeding seven days, and where regularly scheduled trips are not required for a period not exceeding seven days no deduction will be made from the contractor's pay. The postmaster should immediately report such emergency or omitted service to the department. When decreases may be made the postmaster should report the facts to the department and an order will be issued by the Second Assistant Postmaster General decreasing the service accordingly. For any authorized change in the service other than emergency service or omitted service, above referred to, the pay of the contractor will be increased or decreased, as the case may be, at the rate per mile of travel as shown by the annual rate of the proposal of the accepted bidder and the annual miles of travel based on the frequency and distances shown in the above statement of service. So much of the 'Instructions to bidders' as is inconsistent with the foregoing shall not apply to the contract for service on this route.

"The term 'trip' as applied to this route means a dispatch of mails by one wagon of any size specified in the advertisement, and such wagon may be of the largest size, if necessary.

"If service on this route (445004) is let, the service advertised herein under route No. 445004–A will not be awarded."

This bulletin called for the same service as that first issued, and was substantially the same in all respects, differing from it in the omission of the statement quoted in Finding II as to the
18 obtaining of additional information from the postmaster and in the addition of the "Note," not found in the first bulletin.

A bulletin dated March 21, 1911, inviting proposals for screen-wagon mail service in the city of St. Louis, including therein instructions to bidders, form of proposal, contract, bond, etc., and also including the matter contained in the bulletin above referred to with reference to route No. 445004, is in the record, and findings are requested by defendant as to matter contained therein, but it is not shown that such bulletin was submitted to the plaintiffs.

Upon the receipt of the second bulletin plaintiffs had conferences with the postmaster and assistant postmaster at St. Louis, in which they suggested the impossibility of procuring required equipment by July 1, and in which they were told that the work contemplated could not begin at that time because the new post office would not then be completed and that the department would take care of the situation.

Plaintiffs thereupon, under date of April 4, 1911, transmitted to the Second Assistant Postmaster General the communication following, accompanied by the bid also following:

"DEAR SIR: We herewith submit our bids for contract automobile services to carry the mail on routes No. 445004 and 445004–A, being known as circuit No. 1 to 7, inclusive, for a total sum of twenty-one thousand five hundred sixty-three dollars and thirty-three cents ($21,563.33) per annum, being on a basis of sixty-seven thousand nine hundred and sixteen (67,916) miles, at thirty-one and three-fourths cents (31¾) per mile carried.

"We also agree to perform additional services on above routes on the same basis.

"Respectfully,

"EUGENE A. FREUND,
"*1560 South Broadway.*
"A. F. ROEMMICH,
"*1937 Park Ave.*"

"*Proposal.*

"[Regulation screen-wagon service.]

"City of St. Louis, Mo., Route No. 445004—445004 A, circuits = 1, 2, 3, 4, 5, 6, 7.

"The undersigned Eugene A. Freund and Alfred F. Roemmich, whose post-office address is 1560 So. Broadway, 1937 Park Ave., city of St. Louis, State of Missouri, proposes to carry the mails of the United States from July 1, 1911, to June 30, 1915, on above-numbered route, being the regulation screen automobile wagon service in the city of St. Louis, State of Missouri, under the advertisement of the

Postmaster General, dated October 1, 1911, and subject to all the requirements and conditions contained therein, for the sum of twenty-one thousand five hundred and sixty-three 33/100 dollars (21,563.33) per annum, on a basis of thirty-one and three-fourths (31¾) cents per mile; and if this proposal is accepted he will enter into contract, with sureties to be approved by the Postmaster General, within thirty days after the date of acceptance; and will give his personal supervision to the performance of the service and will reside on or contiguous to this route.

19 "This proposal is made in my own interest and not as the agent or representative of another person or company, and after due inquiry into and with full knowledge of all particulars in reference to the service and, also, after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby.

"Dated April 4th, 1910.

"EUGENE A. FREUND,
"ALFRED F. ROEMMICH,
"*Bidders.*

"$21,563.33, on a basis of 31¾ cents per mile."

"[Oath required by section 245 of an act of Congress approved June 23, 1874, to be affixed to each bid for carrying the mail, and to be taken before an officer qualified to administer oaths.]

"I, Eugene A. Freund and Alfred F. Roemmich, of St. Louis, Mo., bidders for carrying the mail on the regulation screen-wagon route No. 445004–445004A, at the city of St. Louis, Mo., known as circuits 1 to 7, and we do swear that we have the ability, pecuniarily, to fulfill my obligations; that the bid is made in good faith and with the intention to enter into contract and perform the service in case my bid is accepted.

"EUGENE A. FREUND,
"A. F. ROEMMICH,
"*Bidders.*

"Sworn to and subscribed before me, a notary public for the city of St. Louis, this 4th day of April, A. D. 1911, and in testimony thereof I hereunto subscribe my name and affix my official seal the day and year aforesaid.

"JUL R. WOLFF [L. S.],
"*Notary Public.*"

Thereafter, on April 13, 1911, plaintiffs, for the purpose of correcting mileage and restating bid accordingly and in reply to a communication from the Post Office Department, transmitted thereto the following:

"ST. LOUIS, MO., *Apl. 13, 1911.*

"SECOND ASSISTANT POSTMASTER GENERAL,

"*Washington, D. C.*

"Replying to your letter 11th E. H. B. apply our bid to route number four forty-five ought ought four (445004) mileage basis at twenty-one thousand five hundred sixty-three dollars thirty-three cents ($21,563.33) per annum. Based on corrected mileage figures of sixty-eight thousand ninety-three and two-tenths, 68,093.20 miles per annum and thirty-one and sixty-six hundredths, 31.66 cents per mile. Our letter follows properly certified as requested.

"EUGENE A. FREUND,

"*1560 So. Bdway.*

"ALFRED F. ROEMMICH,

"*1937 Park Ave.*

[In reference bid automobile service route No. 445004. Answering your letter 11th.]

20 "ST. LOUIS, MO., *April 13, 1911.*

"JOSEPH STEWART, ESQ.,

"*Second Assistant Postmaster General,*

"*Washington, D. C.*

"DEAR SIR: Answering your letter of the 11th inst. It was our intention and you may consider our bid to apply on route number 445004 (mileage basis) at a total cost of twenty-one thousand five hundred sixty-three dollars and thirty-three cents ($21,563.33) per annum, being on a basis of sixty-eight thousand ninety-three and two-tenths (68,093.2) miles per annum at thirty-one and sixty-six hundredths (31.66) plus cents per mile.

"Please insert the above corrected mile rate in our bid instead of the rate given thereon in error, namely 31.75 cents per mile, which rate we figured basing the annual mileage at 67,916 miles instead of 68,093.20 as you advised.

"The mileage figures which we used first as a basis were handed to us by the superintendent of deliveries and we inclose them herewith for your inspection.

"We also inclose letter concurring our action by the American Fidelity Co.

"Respectfully,

"ALFRED F. ROEMMICH,

"*1937 Park Ave.*

"EUGENE A. FREUND,

"*1560 So. Broadway.*"

V.

Under date of April 20, 1911, plaintiffs were notified of the acceptance of their bid and shortly thereafter a contract prepared in the Post Office Department was sent to the postmaster at St. Louis for execution by them. The notification of acceptance was as follows:

"GENTLEMEN: The Postmaster General has accepted your proposal under the advertisement of March 21st, 1911, for carrying the mail from July 1, 1911, to June 30, 1915, on route No. 445004, being regu-

lation automobile screen-wagon service, at St. Louis, Mo., at $21,563.33 per annum.

"You are reminded that in your proposal for service on this route you stated that the proposal was made 'after due inquiry into and with full knowledge of all particulars in reference to the service; and also, after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby.'

"Your particular attention is called to the requirement that you must have on the route ready for use on the first day of the contract term the full number of wagons and carts specified in the advertisement for this route; that this equipment must be new, or, if not new, be rebuilt when necessary, and repainted, and be substantially as good as new, and be built in accordance with the plans and specifications adopted by the department; that the horses must be adapted to the work and must conform to the specifications; and that the wagons, horses, and harness must be kept at all times in first-class condition, as required by the conditions imposed by the 'Instructions to Bidders' in the advertisement.

21 "You are cautioned to have your equipment meet the requirements and to see that the service is performed in accordance with the terms of your contract.

"A copy of the advertisement and a set of the plans and specifications are inclosed herewith.

"Contracts will be sent in due time to the postmaster at your place of residence, which must be properly executed and filed in the department within thirty days from this date.

"Respectfully,

"JOSEPH STEWART,

"*Second Assistant Postmaster General.*"

Plaintiffs again had conference with the postmaster with reference to the requirement that service should commence on the 1st of July, were assured that the matter would be adjusted in due time, and were urged to sign the contract. On May 22, 1911, they signed the formal contract, which was as follows:

"*Contract for mail service.*

"Regulation motor screen-wagon service in the city of St. Louis, Missouri. Route No. 445004. Annual rate of pay, $21,563.33.

"Contractors' addresses: Eugene A. Freund, 1560 South Broadway, St. Louis, Missouri; Alfred F. Roemmich, 1937 Park Avenue, St. Louis, Missouri.

"This article of contract, made the 20th day of April, nineteen hundred and eleven, between the United States of America (acting in this behalf by the Postmaster General) and Eugene A. Freund and Alfred F. Roemmich, contractors, and Southern Surety Company, a corporation with general offices at St. Louis, Missouri, as their sureties:

"Witnesseth, that whereas Eugene A. Freund and Alfred F. Roemmich have been accepted as contractors for transporting the mails

on route 445004, being the regulation motor screen-wagon service at the city of St. Louis, Missouri, under bulletin advertisement issued by the Postmaster General on the 21st day of March, 1911, for such service, which advertisement is hereby referred to and made by such reference a part of this contract, and for performing such additional service of said kind, or kinds, as is provided by the terms of said advertisement, which may at any time during the term of this contract be required in said city, at the rate of twenty-one thousand five hundred sixty-three and thirty-three hundredths dollars ($21,563.33) per annum, for and during the term beginning the first day of July, 1911, and ending June 30, 1915.

Now, therefore, the said contractors and their sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

"First. To carry said mail in a safe and secure manner, using therefor substantial, regulation motor screen wagons, of the kind more fully described in the advertisement above referred to, in sufficient number and of sufficient capacity, to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in said advertisement; the wagons to be new, or substantially as good as new, at the beginning of the contract term, of first-class material and construc-
22 tion, suitable for the proper performance of the service, affording complete protection to the mails from depredation, inclement weather, or other injury, to be kept thoroughly painted, cleaned, and in good condition at all times, and subject in all respects to the approval of the Postmaster General.

"Second. To take the mail from, and deliver it into, the mail stations, railroad stations, and cars at such points and at such hours, under the direction of the postmaster at said city, approved by the Postmaster General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

"Third. To furnish the number of said wagons (of the required sizes) that, in the opinion of the postmaster at said city, approved by the Postmaster General, will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, withdrawn from service for repairs, or required for special or advance trips.

"Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be answerable and accountable in damages for the careful and faithful conduct of the person or persons

who may be employed by said contractors and to whom the said contractors shall commit the care or transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care or transportation of said mails; and, further, that said contractor shall not commit the care or transportation of the mail to any person under eighteen years of age, or any person undergoing a sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction, or to any person who has not satisfied the postmaster or his representative (subject to the approval of the department) that he has good moral character and ability to perform the service, has taken the oath prescribed by law, can read and write the English language, and has passed the required examination and furnished the necessary recommendations as to his qualifications and fitness.

"Fifth. To discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster General so to do; not to transmit by themselves, or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

"Sixth. To account for any pay over any money belonging to the United States which may come into possession of the contractors, their sureties, or employees.

"Seventh. That foreign mail in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

"Eighth. To carry post-office blanks, mail locks, and mail bags, and all other postal supplies.

23 "Ninth. To convey, when requested so to do, railway post-office clerks, substitutes, or messengers authorized to accompany the mails on the driver's seat of each wagon.

"Tenth. To perform any and all new and additional service that the Postmaster General may order during the contract term, between post offices, between the post office and railroad stations, between the post office and steamboat landings, between the post office and mail stations, between the post office and the points of exchange with electric or cable cars, and between the several post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, named in the schedule of service for said route in said advertisement, and to and from other like points not named therein. Also to perform any and all additional service during the contract term that may be caused by changes of site of said post offices, railroad stations, steamboat landing, mail stations, or points of exchange with electric or cable cars.

"Eleventh. It is further agreed that the contractors or carrier shall not transport intoxicating liquors from one point to another on this route, while in the performance of mail service.

"For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster General, the said contractors are to be paid by the United States at the rate per annum hereinbefore named; payments to be made monthly, and as soon after the close of each month as accounts can be adjusted and settled, said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

"It is hereby stipulated and agreed by the said contractors and their sureties that the Postmaster General may change the schedule, vary, increase or decrease the trips on this route, or extend the trips to any new location of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with cable or electric cars named in the schedule for service for said route, in said advertisement, establish service to and from like offices, stations, landings, or points not named therein, and vary, increase, or decrease the trips thereto, and discontinue service between any of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, or between any of them: *Provided*, That for any increase or decrease in the service authorized by the Second Assistant Postmaster General, the pay of the contractors shall be increased or decreased, as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel, based on the frequency and distances shown in the schedule of service for said route in said advertisement: *Provided further*, That where additional trips become necessary for the performance of the service herein provided for by reason of an emergency, the contractor shall perform such trips as the postmaster at St. Louis may require, for a period not exceeding seven days, without additional compensation.

"And it is further stipulated and agreed, that the Postmaster General may discontinue the entire service under this contract whenever the public interest, in his judgment, shall require such dis-
24 continuance, but for a total discontinuance of service the contractor shall be allowed one month's extra pay at the rate of compensation stated at the time of the issuance of the order of discontinuance, as full indemnity.

"And it is further stipulated and agreed, that for a failure to deliver the mail not beyond the control of the contractors, or for any delay or interference with the prompt delivery of the mail at the places required herein, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractors shall forfeit, and there may be withheld from their pay,

such sum as the Postmaster General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

"And it is further stipulated and agreed, that the Postmaster General may annul this contract for repeated failure or for failure to perform service according to contract; for violating the postal laws and regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a driver or any other person handling mail under the contract, when required by the department; for subletting the service without the consent of the Postmaster General, or for assigning or transferring the contract; for combining to prevent others from bidding for the performance of postal service; for transmitting out of the mail commercial intelligence or matter which should go by mail, contrary to the stipulations herein, or for transporting persons so engaged; for the failure of the contractors to give their personal supervision to the performance of the service, or to reside on or contiguous to the route; whenever either of the contractors shall become a postmaster, assistant postmaster, or Member of Congress, and whenever, in the opinion of the Postmaster General, the service can not be safely continued, the revenues collected, or the laws maintained.

"And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractors and their sureties, under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractors or their sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor for the Post Office Department.

"And it is hereby further stipulated and agreed by the said contractors and their sureties that this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or another contractor shall be made by the Postmaster General.

"And it is further stipulated, that no Member of or Delegate to Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

"And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post offices and post roads.

"In witness whereof, the said Postmaster General has caused the seal of the Post Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster General, in accordance with the act of Congress approved March 3, 1877 (sec. 3, 19 Stats., p. 335), and the said contractors and their sureties have hereunto set their

hands and seals the day and year set opposite their names, respectively.

"Signed, sealed, and delivered this 26th day of May, 1911, by the Second Assistant Postmaster General in the presence of—

"By order of the Postmaster General:

"JOHN W. HOLLYDAY.

"JOSEPH STEWART,
"*Second Assistant Postmaster General.*

"Signed this 22d day of May, 1911.

"EUGENE A. FREUND, [SEAL.]
"ALFRED F. ROEMMICH, [SEAL.]
"*Contractors.*

"E. F. MARTIN,
"EMILIE N. OSTER,
"*Witnesses to signatures of contractors.*

"Signed this 22d day of May, 1911.

"SOUTHERN SURETY COMPANY,
"By J. H. HUCKLEBERRY, [SEAL.]
"*Vice President.*
"Attest E. G. DAVIS, [SEAL.]
"*Secretary.*"

Said contract was transmitted to the Post Office Department May 23, 1911, with the following letter:

"MAY TWENTY-THIRD, 1911.

"Hon JOS. A. STEWART,
"*2nd Assistant Postmaster General, Washington, D. C.*

"DEAR SIR: Enclosed please find contracts covering route #445004, St. Louis, Mo., executed by us in duplicate.

"We find that while the total amount of dollars per annum, namely, $21,563.33, for service, as advertised, is stated in the contract, the mileage, 68,093.2, also the rate, 31.66, is omitted, and as this contract is on the mileage basis, we think the mileage and the rate should be stated. Please give us your opinion on this matter.

"Finding it to be necessary, we hereby make application for extension of time from July 1st, 1911, to such later date as the department may see fit to grant us. We are making this request after consulting the gentlemen connected with the department here.

"Please send us a copy of the bulletin advertisement covering the above contract, if you have one.

"Thanking you in advance, we are,
"Respectfully,

"A. F. ROEMMICH & E. FREUND."

26 On May 26, 1911, the contract was executed by the Second Assistant Postmaster General, who, under date of May 31, 1911, wrote the plaintiffs as follows:

"POST OFFICE DEPARTMENT,
"SECOND ASSISTANT POSTMASTER GENERAL,
"*Washington, May 31, 1911.*

"Messrs. EUGENE A. FREUND and A. F. ROEMMICH,
"*1560 So. Broadway, St. Louis, Mo.*

"GENTLEMEN: Referring to your letter of the 23rd inst., with which you forwarded contract in duplicate for service on route 445004 at St. Louis, Mo., for the term beginning July 1 next, and to the application contained in the third paragraph of your letter for extension of time from July 1, 1911, to such later date as the department may see fit to grant you for the commencement of service, you are informed that your proposal was accepted and the contract entered into pursuant thereto with the specific stipulation that the service should begin with July 1, 1911. The department can not, therefore, grant your request to begin service thereunder at a later date, but you will be expected to at once make preparation to take up the service on the first day of the contract term.

"The department is having prepared a statement of such service as it is thought will be in actual operation on July 1 next, and when it is completed and filed in this office a copy of the same will be sent you, in order that you may be more fully informed as to the service that may be required.

"Very respectfully,

"JOSEPH STEWART,
"*Second Assistant Postmaster General.*"

VI.

After executing the contract plaintiffs conferred with the department with reference to the equipment for its performance, were furnished a color scheme, but directed to submit their own drawings of the proposed equipment for approval. They investigated as to the required size, carrying capacity, speed, etc., examined equipment in use in another city, and were of the opinion, after such investigation, that the six motor vehicles mentioned in the bulletin would be sufficient for the service contemplated by the contract.

Plaintiffs also had a conference about June 15 to 20 with the Second Assistant Postmaster General, in which they reported to him the information given them by the postmaster at St. Louis and relied upon by them to the effect that the contemplated work would not be ready for them July 1, and represented to him that the time was insufficient within which to procure the required equipment and also that that equipment would be insufficient for the performance of the work which it then appeared was going to be required of them. This conference was sought because of the notification that they

would be required to commence work on July 1, and they believed that if so required the work they would be called on to do would be a continuance of the old service then being performed by another contractor, who had in use a large equipment consisting of 18 post-office wagons of different capacities.

27 They were informed that under the terms of the contract they would be required to commence work on July 1, and that a schedule of the work to be required would be forwarded to them. On June 30 they received from the postmaster at St. Louis a copy of an order restating the service on route No. 445004 as follows:

"POSTOFFICE DEPARTMENT,
"SECOND ASSISTANT POSTMASTER GENERAL,
"*Washington, June 30, 1911.*

"POSTMASTER, *St. Louis, Mo.*

"SIR: An order has been issued to-day on route No. 445004, screen-wagon service at St. Louis Mo., restating the service from July 1, 1911, making total annual travel 57,679.60 miles and pay $18,265.61 per annum, being pro rata of original contract price.

From—	To—	Length of trip, miles.	No. of trips daily except Sundays and holidays (306).	No. of trips on Sunday (52).	Additional trips a week (52).
GPO	Union Depot	1.18	71 71. Holidays (7).	37	4
Union Depot	GPO	1.18	32 32. Holidays (7).	25	2
GPO	United Railways of St. Louis (8th and Market).	0.21	29 23. Holidays (7).	6	.....
United Railways of St. Louis (8th and Market).	GPO	0.21	31 12. Holidays (7).	4	.....
GPO	United Railways of St. Louis (8th and Locust).	0.09	.....	.....	.....
United Railways of St. Louis (8th and Locust).	GPO	0.09	8 3. Holidays (7).	1	.....
GPO	Cupples Sta	0.50	10 5. Holidays (7).	.....	.....
Cupples Sta	GPO	0.50	10 5. Holidays (7).	.....	.....
GPO	Merchants Sta	0.50	9 4. Holidays (7).	.....	.....
Merchants Sta	GPO	0.50	9 5. Holidays (7).	.....	.....
GPO via Merchants Sta	Bridge Sta	0.76	2 1. Holiday (7).	.....	.....
Bridge Sta. via Merchants Sta	GPO	0.76	1	.....	.....
GPO	Bridge Sta	0.60	3 2. Holidays (7).	.....	.....
Bridge Sta	GPO	0.60	.....	.....	.....
GPO	Progress	0.70	1. Holiday (7).	.....	.....
Progress	GPO	0.70	4. Holidays (7).	.....	.....
Progress Sta	Annex Sta	0.60	3. Holidays (7).	.....	.....
Merchants Sta. via Bridge Sta	GPO	0.76	2 2. Holidays (7).	.....	.....
18th and Olive (345001)	Annex Sta	0.50	3	.....	.....
18th and Clark (345001)	Annex Sta	0.09	2	.....	.....

"Respectfully,

"(Signed) JOSEPH STEWART,
"*Second Assistant Postmaster General.*"

And they were also furnished by the postmaster with detailed schedule of the service required, in which was set out the time of all required trips between the post office and the Union and other stations, the time of trains to be met for the transmission and receipt of mails, etc.

28 Plaintiffs protested to the Second Assistant Postmaster General, to the postmaster at St. Louis, and to a Mr. Porter, a representative of the Post Office Department then at St. Louis, against being required to perform this service on the ground that it was an entirely different service from that contemplated by their contract and not within its requirements.

At a conference on June 30, at which the plaintiffs, the postmaster and his assistant, Mr. Porter, and the then contractor, Mr. Lewis, were present, plaintiffs appealed to Mr. Porter for relief from the order, stating that they would be ruined financially. Mr. Porter requested Mr. Lewis to continue the service under his contract for six months longer, which Lewis refused to do, and he (Porter) informed plaintiffs that it was beyond his province to do anything in the matter, that his purpose was to see that the service commenced on July 1, and that if they did not do so the contract would be readvertised and they would be sued on their bond. The authority of Mr. Porter in the matter is not shown.

Plaintiffs being without required equipment they were permitted to carry on the work with the screen wagons used by the former contractor, and they arranged with him to carry on the service and protect it with his equipment from day to day, at a price stipulated between them, and through him, temporarily, and by themselves they performed the restated service from July 1, 1911, to midnight of October 26, 1912.

VII.

At the same time the advertisement for the bulletin hereinbefore mentioned was issued, the defendant had under construction a new postoffice building at a new site about 13 blocks distant from the old, and the service for the new contract term to begin July 1 was therefore stated on the basis of circuit trips from the new post office, by various postal stations, and returning to the place of beginning.

Before plaintiffs submitted their bid it was known to them and to the postmaster at St. Louis that the new post office would not be ready for occupancy by July 1. Just when the Post Office Department knew that the new post office would not then be ready for occupancy is not shown, but it does appear that at or near the time plaintiffs' contract was executed in the Post Office Department there was being prepared in the department a statement of the service which it was thought would be in actual operation on July 1. The building was not ready for occupancy by the post office until October 26, 1912.

The service required of plaintiffs by the order of June 30, 1911, was, in fact, a continuation of the services then being performed by the preceding contractor and was necessary in the transportation of mails in the city of St. Louis.

The service bid upon was a circuit service on seven circuits, on a mileage basis, each circuit beginning and ending at the new post office and for which the contractor was paid for every mile traveled regardless of the quantity of mail carried or whether for any part of the distance no mail was carried. The restated service was a trip service for which payment was made on a mileage basis when mail was carried, but no payment was made for a return trip if
29 mail was not carried or for distance traveled by empty vehicles in going to a point from which mail was to be moved.

The service bid upon involved the handling of the mails for a small area and was a comparatively light service. The restated service required the hauling of incoming and outgoing mails for the entire city and involved handling several times the weight of mail. The service bid on required 6 automobiles. The restated service required 18 wagons of different capacity exceeding several times in aggregate capacity that required for the bid on service. The mileage of each wagon, when carrying mail, was allowed and paid for. The larger bulk of mail required proportionately more time in loading and unloading.

The bid upon service, with the exception of one early trip on each of these circuits, was all to be performed within 12 hours from approximately 8 a. m. to 8 p. m. The restated service required trips during practically every hour of the twenty-four.

VIII.

Under date of October 18, 1912, effective October 28, 1912, the service required on route No. 445004 was restated on the seven-circuit basis beginning and ending at the new post office as contemplated by the bulletin upon which plaintiffs bid, and that service was performed by plaintiffs during the remainder of their contract term.

IX.

The cost of the plaintiffs for the performance of the service required during the 16 months beginning July 1, 1911, was $43,726.89. They were paid by the defendant for such service $24,289.62.

The service was performed for some months entirely by the former contractor's equipment under the supervision of one of the plaintiffs for which they paid him each month. During November, 1911, they began to receive their own automobile equipment and installed the same and retired from service such of the former contractor's equipment as could be dispensed with, reducing the payments to him, but some of his equipment was used during the entire term covered by this service.

During the most of July, August, September, and October plaintiffs paid Lewis, the former contractor, for this service $2,325 per month, and the service was worth that amount. Thereafter, in reduced monthly amount, as stated, they paid him $4,708.12, and the service rendered was worth that amount.

The plaintiffs performed the service after October, 1912, at a profit of 42 per cent on its cost.

X.

For the service rendered by the plaintiffs they were paid by the defendant on a mileage basis each month, based on the mileage traveled when carrying mails, and they received such payments without protest.

30 XI.

The mileage necessarily traveled by the plaintiffs in the performance of the restated service for the 16 months beginning July 1, 1911, over which they did not in fact carry any mail, being mileage traveled empty on the return trip after delivering mail or mileage traveled empty in going to receive mail, amounted to 23,204.89 miles, which if paid for at the mileage rate applied to the service paid for would amount to $7,346.66.

Conclusion of law.

Upon the facts found the court concludes as matter of law that the plaintiffs are entitled to recover of and from the defendant the sum of seven thousand three hundred forty-six dollars and sixty-six cents ($7,346.66) as found in Finding XI, and judgment is ordered accordingly.

Opinion.

Downey, judge, delivered the opinion of the court:

Plaintiffs sue to recover for services rendered in carrying the mails in the city of St. Louis for a period of about sixteen months beginning July 1, 1911, a part of the contract period hereinafter referred to. It was the service commonly called Screen-Wagon Mail Service. For the purposes of this opinion it is not necessary to repeat in detail the facts, as they are set out in the findings. There are, in fact, many things set out in the findings which, as we view the case, are not material and therefore not for our consideration, but they are set out because requested by plaintiffs and because they do bear upon plaintiffs' theory of the case.

After bulletin advertisement and bid by the plaintiffs they were awarded and entered into a contract for the performance of mail service in the city of St. Louis for a period of four years beginning July 1, 1911. There was then building in the city of St. Louis a new post office, not yet completed. It is apparent if it had been ready for

service by July 1, 1911, there would have been no trouble as an outgrowth of this contract, for the service contemplated was a circuit service beginning and ending at the new post office, and when the new post office was finally completed ready for occupancy and the service originally contemplated by the plaintiffs was entered upon, it was performed apparently to the satisfaction of both parties and without controversy as to compensation. Whether it was known to the Post Office Department when the schedule of service operative from and to the new post office, and included in the bulletin, and bid upon, was prepared, that the new post office would not then be ready for occupancy, does not appear. It does appear that before bidding and before entering into the contract the plaintiffs knew the post office would not be completed then; the postmaster at St. Louis well knew that it would not be completed then and for some time, not definitely shown, antecedent to the commencement of the proposed four-year term, the Post Office Department knew that the new building would not be ready for occupancy at that time. However that may be,
31 the contract was entered into and it required the plaintiffs to begin service July 1, 1911.

A screen-wagon mail service was then in operation in the city of St. Louis, handling the mails between various railroad stations and the post office. It was a service being rendered and paid for upon a basis theretofore provided in the Post Office Department with reference to such matters and from which the new service contemplated by plaintiffs' contract was a departure in that this new service contemplated payment upon a mileage basis for the miles traveled in handling the mails and, in this particular instance, contemplated a circuit service, beginning and ending as to each circuit at the new post office, and involving compensation for all miles traveled by the contractors' vehicles.

Shortly before the beginning of the contract period, it being apparent that the service contemplated could not then be rendered, there were conferences with reference to the matter as between the postmaster at St. Louis and these plaintiffs, the postmaster and his assistant at St. Louis and these plaintiffs, and between these plaintiffs and the Second Assistant Postmaster General, having charge of this particular class of service. As between the plaintiffs and the postmaster and his assistant at St. Louis, it appears that the plaintiffs were urged to submit their bid and to enter into the contract upon the representation that even though thereby they were required to commence service on July 1 the department would take care of the matter when the time came. Whether plaintiffs had any right to rely in any degree upon these representations made by the postmaster and his assistant at St. Louis is not necessary for our determination. The Second Assistant Postmaster General informed the plaintiffs after they had submitted their bid, and again after having entered into their contract, that they would be expected to commence service on the 1st of July, as provided in their bid and contract, and that a

statement as to the service required would in due time be furnished them.

Late in June they were furnished by the postmaster at St. Louis with an order of the Post Office Department restating the service required on the first day of July, 1911, and thereafter until further order. The restated service was a continuation of the service then being performed by another contractor and was in many respects radically different from the service contemplated by the plaintiffs' contract, although in restating the service it appears that compensation was provided for on a mileage basis pro rated to the contract.

The plaintiffs contend that the restated service required of them and upon the performance of which they entered under protest was not the service contemplated by their contract and that it was not a service within the contemplation of any provision in the contract, and that for the performance of such service they are entitled to be paid under an implied contract and upon a quantum meruit basis. The defendant contends that the service was an additional service which the Postmaster General had a right to require of the plaintiffs under a provision of their contract set out in the findings or that, if it be held that it was not such a service and therefore not performed under the contract, it was a service performed by the plaintiffs in response to the order of date of June 30, 1911, calling upon
32 plaintiffs to render the service and stating the compensation to be paid therefor, and hence a service to be compensated for on the stated basis and not otherwise.

In view of the widely different character of the service required from that contemplated by the contract, we may doubt whether the service was such new and additional service as might be required under the contract, but we do not find it necessary for our purposes to determine the question. When we reach the question of the basis of compensation we may conclude that it is not material whether that basis is found in the contract or in the order of June 30, 1911.

The plaintiffs' theory clearly is that the service required and performed, not being within the purview of the contract, was a service which the plaintiffs were not thereby required to perform. This theory must be adopted in the determination of the case; and if it be adopted as contended for by plaintiffs, it must necessarily follow that the plaintiffs, as to the performance of the restated service, were free agents and might perform or not, as they saw fit. There could be no obligation upon the part of the plaintiffs to perform such a service for the Post Office Department unless it were a contract obligation. The situation, then, seems simply to be that the Post Office Department, by its order of June 30, 1911, requested or assumed to require of the plaintiffs the performance of a stipulated service in the carrying of the mails which they were not bound to render and stated in connection therewith the compensation which would be paid for the service. It is well settled that the performance of a service for the United States under such circumstances is to be compensated for upon the basis proposed and not otherwise.

The principle is settled in many of the cases, among which we cite the following:

A., T. & S. F. Ry. Co. v. United States, 225 U. S., 640; C., M. & St. P. Ry. Co. v. United States, 198 U. S., 385; Eastern R. R. Co. v. United States, 129 U. S., 391; Atlantic Coast Line v. United States, 53 C. Cls., 638, affirmed 251 U. S., 546; K. C., M. & O. Ry. Co. v. United States, 53 C. Cls., 258, and cases cited, affirmed 251 U. S., 326; N. Y., N. H. & H. R. R. Co. v. United States, 53 C. Cls., 222, affirmed 251 U. S., 123.

In determining the compensation to be awarded the plaintiffs under this order some facts are necessary for consideration. As already suggested, the service contemplated by plaintiffs' contract was upon a new basis adopted by the Post Office Department, viz, compensation upon a mileage basis and in this case compensation upon such a basis as that the contractors should be paid for all miles necessarily traveled in the performance of the service. The restated service which was in fact a continuation of the old service was not upon a circuit basis but involved trips back and forth between the post office and railroad stations and other points where mail was to be delivered and received. It is conceded by the defendant that the plaintiffs were entitled to compensation for this service upon a mileage basis, but the defendant contends that the compensation is to be limited to compensation for the miles traveled when actually carrying mail. In making a trip, for example, from the post office to a railroad station carrying mail it happened much of the time that the same vehicle in returning from the station to the post office carried incoming mail, and in such instances, the
33 plaintiffs being allowed for all mileage when carrying mail, compensation was actually paid for a round trip. But in some instances it was necessary for the vehicle performing a required trip from the post office to the railroad station carrying mail to return, for the purposes of the service, empty, and in such cases the return trip when not carrying mail was not paid for.

Plaintiff's theory of the case in this view of it is that since it performed a given number of miles of service in the carrying of mails for which they were compensated they also performed an equal number of miles of necessary travel when they were not carrying mails, because of the fact that the service was a trip and not a circuit service. But the facts already cited are sufficient answer to this contention. It is to be admitted that it is difficult to determine how many miles were necessarily traveled in the performance of this service when mails were not carried and for which compensation was not paid, but the findings have solved the question as accurately as the record justifies, and upon that basis we have concluded that the plaintiffs are entitled to recover. It may be added upon the question of compensation that it seems to us clear that the compensation provided for in the order of June 30, 1911, was derived from and intended to be on the basis of the plaintiffs' contract and that contract did not contemplate any dead mileage.

Our conclusion is that the plaintiffs are entitled to recover for all mileage necessarily traveled in the performance of the service required by the order of June 30, 1911, and not paid for, and they are accordingly awarded judgment in the sum of $7,346.66.

Graham, Judge; Hay, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

34 V. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the thirteenth day of December, A. D. 1920, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiffs and do order, adjudge, and decree that the plaintiffs, as aforesaid, are entitled to recover and shall have and recover of and from the United States the sum of seven thousand, three hundred and forty-six dollars and sixty-six cents ($7,346.66).

By the Court.

VI. *Plaintiffs' application for and allowance of an appeal.*

Now come the plaintiff, by their attorneys, and pray the allowance of an appeal to the Supreme Court of the United States from the judgment of this court herein, rendered December 13, 1920, the amount involved exceeding $3,000.

Respectfully submitted,

HARR & BATES,
Attorneys for Plaintiff.

Filed Feb. 7, 1921.

Ordered: That the above appeal be allowed as prayed for.

By the Court.

Feb. 7, 1921.

VII. *Proceedings after entry of judgment.*

On December 20, 1920, the plaintiffs made a motion for a new trial. This motion was overruled by the court January 10, 1921.

35 Court of Claims.

EUGENE A. FREUND AND ALFRED F. ROEMMICH
vs.
THE UNITED STATES. } No. 33855.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Downey, J.; of the judgment of the court; of the plaintiffs' application for

and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this February 8th, A. D. 1921.

[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

36 [Office of the Clerk, Supreme Court U. S. Received Mar. 2, 1921.]

In the Court of Claims of the United States.

Dec. Term, 1920.

EUGENE A. FREUND AND ALFRED F. ROEMMICH
vs.
THE UNITED STATES. } No. 33855.

From the judgment rendered in the above-entitled cause on the 13th day of December, 1920, in favor of claimant, the defendants, by their Attorney General, on the 23rd day of February, 1921, make application for, and give notice of, a cross-appeal to the Supreme Court of the United States.

FRANK DAVIS, Jr.
Assistant Attorney General.

Filed February 23, 1921.

Ordered: That the above cross-appeal be allowed as prayed for.
By the Court.

February 28, 1921.

A true copy:
Attest this first day of March, A. D. 1921.
[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:)

37 File No. 28,093, Court of Claims. Term No. 736. Eugene A. Freund and Alfred F. Roemmich, appellants, *vs.* The United States. Filed February 14, 1921. File No. 28,128. Term No. 771. The United States, appellant, *vs.* Eugene A. Freund and Alfred F. Roemmich. Filed March 2d, 1921. File Nos. 28,093 and 28,128.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921

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ALPHABETICAL LIST OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

EUGENE A. FREUND AND ALFRED F. ROEMMICH, *Appellants*, *vs.* THE UNITED STATES.	No. 223.
THE UNITED STATES, *Appellant*, *vs.* EUGENE A. FREUND AND ALFRED F. ROEMMICH.	No. 241.

APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR FREUND AND ROEMMICH.

STATEMENT OF CASE.

Freund and Roemmich, citizens of the United States, brought this suit in the Court of Claims to recover the sum of $34,012.90 as the balance due them for performing certain regulation screen-wagon mail-transfer service for the Post Office Department in the City

of St. Louis, Mo., between July 1, 1911, and October 27, 1912.

The Court of Claims found the facts substantially as alleged by plaintiffs in their Amended Petition. (Rec., 1-7.) In brief, those facts are as follows:

Early in 1911 the Post Office Department advertised for certain screen-wagon mail-station service on Route No. 445004 in the City of St. Louis, the service contemplated being a *circuit* service on a mileage basis over seven circuits, each circuit starting from and ending at the new post office, then being built but not completed, said service to begin July 1, and bidders being referred by the advertisement to the city postmaster for additional information. (Rec., 8, Finding II.)

Plaintiffs called upon the postmaster and assistant postmaster several times for the purpose of obtaining further detailed information about the proposed service, and were furnished a schedule giving the number and hours of the trips and the estimated mileage per day. They were also advised that the new post office could not be completed by July 1st, and therefore the contemplated service would not commence at that time. Plaintiffs also procured information from the postmaster as to the probable amount of mail to be handled in order to determine whether it could be carried in the required equipment, made tests of the stated mileage to be covered, and, after being fully advised as to the nature and amount of the service, submitted, on March 10, 1911, a bid for said service, on a mileage basis. (Rec., 9, Finding III.)

On March 21, 1911, plaintiffs were advised by letter *from the city postmaster* that all bids had been rejected and *he* had been instructed to invite new bids on said route No. 445004 and 445004-A, and enclosing

a copy of the request for bids which is set forth in Finding IV, Rec., 9.

This second request or bulletin called for the same service as that first issued, and was substantially the same in all respects, except the omission of the statement as to the obtaining of additional information from the postmaster and the addition of a "Note" not found in the first bulletin. Said note stated that it might "be necessary to either increase or decrease the trips as shown in the foregoing statement, and to include service to and from other like points not named in said statement, or to discontinue service to and from or between points named", and contained other instructions not necessary to be here stated. (Rec., 10-11.)

Upon the receipt of this second bulletin plaintiffs had conferences with the postmaster and assistant postmaster at St. Louis in which they suggested the impossibility of their procuring the required equipment by July 1, 1911, and in which they were again told that the work contemplated would not begin at that time because the new post office would not be then completed, and the Department would take care of the situation. (Rec., 11.)

Plaintiffs thereupon, under date of April 4, 1911, submitted bids for the service so advertised for, naming a specific sum ($21,563.33), but adding that the same was on the basis of 31¾ cents per mile. A few days later, by letter dated April 13, 1911, plaintiffs corrected their bid to read 31.66 cents per mile, on (as they said) a corrected annual mileage of 67,916 miles, instead of 68,093.20 as the Department had advised. (Rec., 11-13, Finding IV.)

On April 20, 1911, plaintiffs were notified by the Department, in a letter from the Second Assistant Post-

master General, that their said bid had been accepted on Route No. 445004 (the other route being an alternative which was abandoned). In this letter the Second Assistant Postmaster General reminded plaintiffs that in their proposal they stated that the same was made "after due inquiry into and with full knowledge of all particulars in reference to the service; and also after careful examination of the conditions attached to said advertisement, and with intent to be governed thereby;" and also called their particular attention to the necessity of having the requisite equipment ready on the first day of the contract term. (Rec., 14.)

In view of this letter plaintiffs again had a conference with the city postmaster with reference to the requirement that the service should commence on July 1st, and were assured that the matter would be adjusted in due time. (Rec., 14.)

On May 22, 1911, plaintiffs signed a formal contract with the Department. This contract referred to the plaintiffs as having been accepted as contractors for transporting the mails on Route 445004 "*under bulletin advertisement issued by the Postmaster General on the 21st day of March, 1911, for such service, which advertisement is hereby referred to and made by such reference a part of this contract,* and for performing such additional service *of said kind, or kinds,* as is provided by the terms of said advertisement." (Rec., 14-19.)

In transmitting this contract to the Second Assistant Postmaster General, after they had signed it, plaintiffs called his attention to the fact that, while the total amount of dollars per annum for the service, as contracted for, was stated in the contract, the mileage and the rate therefor was omitted, adding,

"as this contract is on the mileage basis, we think the mileage and rate should be stated." (Rec., 19.)

In the same letter plaintiffs said (Rec., 19):

> "Finding it to be necessary, we hereby made application for extension of time from July 1st, 1911, to such later date as the Department may see fit to grant us. We are making this request after consulting the gentlemen connected with the Department here."

On May 26, 1911, *with full knowledge of all the foregoing circumstances*, the Second Assistant Postmaster General executed said contract on behalf of the Department, and then, under date of May 31, 1911, wrote the plaintiffs refusing to grant their request for an extension of the time to begin service, adding that "the Department is having prepared a statement of such service as it is thought will be in actual operation on July 1 next and when it is completed and filed in this office a copy of the same will be sent you," etc. (Rec., 20.)

This letter is significant, in that it shows that the Second Assistant Postmaster General, when he signed said contract in behalf of the Department, knew that the service for which the Department had advertised (predicated on the completion and use of the new post office) could not be installed on July 1, 1911; and that he also knew that plaintiffs were relying upon that fact when they made their bid, and that they had no equipment with which to begin any service on July 1, 1911.

By this time, of course, the plaintiffs had a pretty well-defined suspicion of what the Second Assistant Postmaster General was up to, namely, that he intended to thrust upon them, under the assumed authority of their contract, the old service then being

performed by another contractor and which required the use of a large equipment of post office wagons of different capacities—a service of several times the magnitude of that for which they had contracted. (Rec., 20-21.) Accordingly they had a conference with the Second Assistant Postmaster General about June 15th or 20th, but the latter was adamant and informed them that they would be required to begin work on July 1st, and that a schedule of such work would be forwarded to them. (Rec., 21.)

On June 30th (the day before the service to be substituted was ordered to commence) plaintiffs received from the postmaster at St. Louis a copy of an order issued by the Post Office Department, office of the Second Assistant Postmaster General, under that date, which was addressed to the postmaster at St. Louis and which stated (Rec., 21):

> "Sir: An order has been issued today on route No. 445004, screen wagon service at St. Louis, Mo., restating the service from July 1, 1911, making total annual travel 57,679.60 miles and pay $18,265.61 per annum, being pro rata of original contract price."

Then follows a schedule of the restated service, *stating the trips required on a one-way basis*, instead of on the circuit basis stated for the service advertised for and contracted for by plaintiffs, and, as a corollary, stating the annual mileage and pay at only one-half of what it would have been if the trips had been stated on a circuit basis.

The radical difference between the substituted service required by this order of June 30, 1911, and the service advertised for by the Department appears

from the following statement of the Court of Claims (Finding VII, Rec., 23):

> "The service required of plaintiffs by the order of June 30, 1911, was, in fact, a continuation of the services then being performed by the preceding contractor and was necessary in the transportation of mails in the city of St. Louis.
>
> "The service bid upon was a circuit service on seven circuits, on a mileage basis, each circuit beginning and ending at the new post office and for which the contractor was paid for every mile traveled regardless of the quantity of mail carried or whether for any part of the distance no mail was carried. The restated service was a trip service for which payment was made on a mileage basis when mail was carried, but no payment was made for a return trip if mail was not carried or for distance traveled by empty vehicles in going to a point from which mail was to be moved.
>
> "The service bid upon involved the handling of the mails for a small area and was a comparatively light service. The restated service required the hauling of incoming and outgoing mails for the entire city and involved handling several times the weight of mail. The service bid on required 6 automobiles. The restated service required 18 wagons of different capacity exceeding several times in aggregate capacity that required for the bid on service. The mileage of each wagon, when carrying mail, was allowed and paid for. The larger bulk of mail required proportionately more time in loading and unloading.
>
> "The bid upon service, with the exception of one early trip on each of these circuits, was all to be performed within 12 hours from approximately 8 a. m. to 8 p. m. The restated service required

trips during practically every hour of the twenty-four."

Plaintiffs protested to the Second Assistant Postmaster General, to the postmaster at St. Louis, and to a Mr. Porter, a representative of the Post Office Department then at St. Louis, against being required to perform this service on the ground that it was an entirely different service from that contemplated by their contract and not within its requirements (Rec., 22).

At a conference on June 30, at which the plaintiffs, the postmaster and his assistant, Mr. Porter, and the then contractor, Mr. Lewis, were present, plaintiffs appealed to Mr. Porter for relief from the order, stating that they would be ruined financially. Mr. Porter requested Mr. Lewis to continue the service under his contract for six months longer, which Lewis refused to do, and he (Porter) informed plaintiffs that it was beyond his province to do anything in the matter, *that his purpose was to see that the service commenced on July 1, and that if they did not do so the contract would be readvertised and they would be sued on their bond.* (Rec., 22.)

Plaintiffs, being without the required equipment, were permitted to carry on the work with the screen wagons used by the former contractor, and they arranged with him to carry on the service and protect it with his equipment from day to day, at a price stipulated between them, and through him, temporarily, and by themselves, they performed the restated service from July 1, 1911, to midnight of October 26, 1912 (Rec., 22).

The cost to the plaintiffs of this substituted service required during the sixteen months beginning July 1,

1911, was $43,726.89. They were paid by the defendant for such service $24,289.62 (Finding IX, Rec., 23).

Under date of October 18, 1912, effective October 28, 1912 (the new post office having been completed), the service on said route No. 445004 was restated on the seven-circuit basis beginning and ending at the said new post office, "as contemplated by the bulletin upon which plaintiffs bid", and that service was performed by plaintiffs during the remainder of their contract term (Rec., 23, Finding VIII). This service netted plaintiffs a profit of 42 per cent. on its cost (Rec., 24, Finding IX).

The Court of Claims gave plaintiffs judgment for $7,346.66 (Rec., 28). Dissatisfied with this award, plaintiffs appealed. (Case No. 223 on the docket of this Court.) Subsequently the United States filed a cross-appeal. (Case No. 241 here.)

ARGUMENT.

I.

The substituted service required by the Order of the Post Office Department of June 30, 1911, was not of the character contemplated by plaintiffs' contract, and, having performed the same under protest and compulsion, plaintiffs are entitled to recover full compensation therefor.

The scope of plaintiffs' contract is defined in the contract itself, which recited (Rec., 14-19):

> "Witnesseth, that whereas Eugene A. Freund and Alfred F. Roemmich have been accepted as contractors for transporting the mails on route

445004, being the regulation motor screen-wagon service at the city of St. Louis, Missouri, *under bulletin advertisement issued by the Postmaster General on the 21st day of March, 1911, for such service, which advertisement is hereby referred to and made by such reference a part of this contract, and for performing such additional service of said kind, or kinds, as is provided by the terms of said advertisement,* which may at any time during the term of this contract be required in said city, . . .

"Now, therefore," etc.

Manifestly, the subsequent provisions of this contract are governed and controlled by these specific recitals as to the character of service referred to, namely, that specifically described in said bulletin advertisement of March 21, 1911, and any additional service of the same kind or kinds.

Hence the covenant of the contract marked "Tenth", which provides for "new and additional service" (Rec., 16), and upon which the Post Office Department relied for its authority to make the order of June 30, 1911, must be confined to new and additional service of the same kind and character as that referred to in said bulletin advertisement of March 21, 1921, which was made a part of said contract.

The Court of Claims has repeatedly held that where mail service of the character here in question is materially varied, or where the increase in the same kind of service is so vast that it could not have been contemplated by the contracting parties, it is not "new and additional service" within the general provisions

of such contracts, *but is extra service for which the contractor is entitled to recover just compensation.*

Woolverton's Case, 34 Ct. Cls. 247, decided January 30, 1899;
Union Transfer Company's Case, 36 Ct. Cl. 216, decided April 8, 1901;
Utah, etc. Stage Co. v. *United States,* 39 Ct. Cls. 420, decided April 25, 1904; affirmed November 27, 1905 (199 U. S. 414).

In the *Union Transfer Company's Case,* 36 Ct. Cls. 216, 227, the Court said:

> "The increase of the service from a period of about eight months from the time the contract went into operation was so large and material it would be unjust to claimant to say that such service was contemplated by the parties, and to justify the Department in making an increase of that magnitude the service must be brought clearly within the description of the service specified in the agreement."

In the *Utah Stage Company Case,* 39 Ct. Cl. 420, 435, the Court of Claims, speaking by Chief Justice Nott, said:

> "The present case is peculiar and unlike those which have gone before it in this: That the services constituting the principal cause of action were in form 'new or additional,' but in substance a radical and extraordinary departure from the reasonable obligations of the contract. The very magnitude of the service exacted by the Post-Office Department changed the service in kind and character. In form it was 'new or addi-

> tional;' in substance it was rendered for a new and different system of postal administration in the city of New York of such magnitude that it could not have been anticipated or foreseen by the must prudent and experienced business man who proposed to bid for the service or enter into the contract. It was service different in kind and character, because it was incidental and consequent to the introduction of a condition into the city postal service which had never been there before—the establishment of a new post-office system."

In the case at bar the reverse situation is presented, although the case in principle is the same. The Post-Office Department contemplating a decided change in the existing mail transfer service in St. Louis upon the completion of the new post-office, let that proposed service to plaintiffs, and then finding it could not inaugurate that service at once because the new post office was not ready, thrust the existing radically different and much more burdensome service upon them.

In affirming the judgment of the Court of Claims in the *Utah Stage Company Case*, the Court, speaking by Mr. Justice Day, said (199 U. S. 414, 421-423):

> "It is the contention of the Government that, under the authority of the Postmaster General to require new or additional mail messengers or transfer service, without additional compensation the contractor might be required to perform the additional service made necessary by the establishment of the Industrial Building branch under the authority of the act of Congress of March 3, 1893, 27 Stat. 732, authorizing the renting of the

building to be used for general post office purposes in the city of New York. The findings of fact establish that this Industrial Building branch was more than three miles distant from the general post-office, and was intended to and did transact nearly all of the business north of Fourteenth street. This necessitated the carrying of the mails not only from the general post-office to the railroad stations, but to and from the branch station established at the Industrial Building. In order to perform this service under the directions of the department, complainant was required to furnish eighty additional horses, more than thirty additional wagons, and from thirty-three to fifty additional men, requiring an additional distance to be travelled in wagons, over and above the normal increase, of 311,939 miles for the period from October 5, 1893, to February 6, 1895, and to pay an increased sum for ferrying the wagons across the North and East Rivers of $9,950.22. Can such enormous increase of the service required and the expense entailed be exacted of a contractor who had agreed to perform new or additional service of the kind specified without additional compensation? . . . There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence however great, could not have foreseen. If this were a contract between individuals a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties — without additional compensation,

> would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals. . . ."

Any fair-minded person would suppose that, in view of the decision of this Court in the *Utah Stage Company Case*, and the other cases of a similar character previously decided by the Court of Claims, that it would have been impossible for another such case to have arisen—that no Assistant Postmaster General would have the temerity again to attempt to work such an injustice upon citizen contractors. But later this did not deter the then Second Assistant Postmaster General (who was of counsel in the *Utah Stage Company Case*) from imposing this radically different and most burdensome substituted service upon these innocent and unsuspected contractors upon the assumed authority of their contract—a service for which plaintiffs had not contracted and which they were utterly unprepared to perform, as he well knew.

It was bad enough for the Post Office Department, under such circumstances, to put this onerous service upon the plaintiffs, but, to make matters worse, the Department stated the substituted service in such a way (by single instead of by the circuit trips contemplated by their contract) as to reduce their pay approximately one-half, with the result that for the sixteen months during which the plaintiffs performed the substituted service they expended therefor $43,726.89, for which they were paid $24,289.62 (Rec., 23, Finding IX). In other words plaintiffs were required to perform this substituted service at a loss of approximately $20,000 during these sixteen months.

The persistent efforts of the Post Office Department to take advantage of contractors for this city mail transfer service was again illustrated in the case of *Hunt, Executor of the Estate of William Weighel, Deceased*, v. *United States*, 55 Ct. Cl. 77. The opinion of the Court of Claims "on the proofs" in that case, stated (*id.*, pp. 85-6):

> "Under orders issued by the Postmaster General, which orders are set out in the findings, the subcontractor was required to perform mail service to and from street cars in the city of Chicago. As a result of these orders the subcontractor had to make to and from street cars 523,276 trips, and was obliged to employ 24 men, 4 double vans, and 7 single wagons to perform the service, which had been previously performed by 4 drivers and 4 single wagons, all of which greatly increased the expense of the service, and imposed upon him duties and undertakings which were not contemplated in the contract. The value of the service rendered by the subcontractor in the making of the trips imposed upon him by the orders of the Postmaster General to and from street cars was $52,327.60, no part of which amount has been paid to the subcontractor nor to anyone else. This service was performed under protest, and the contractor notified the defendants that compensation therefor would be demanded. The Government contends that the Postmaster General under the authority conferred upon him by the contract in this case had a right to require the contractor to render new or additional mail messenger or transfer service, and that the trips to and from street cars was such new and additional service as was provided for in the contract. We do not think so.

> **The service required was of an entirely different nature from that described in the contract, imposed upon the contractor very great burdens, and involved him in great expense which he could not have foreseen or guarded against when he entered into the contract."**

The Court of Claims therefore held that the case came within the principles of the *Utah Stage Company Case*, and that recovery could have been had if Travis had sued in time or Weighel had brought suit for his benefit, but not under the then existing circumstances.

The *Weighel* case was appealed to this Court, which, in a decision by Mr. Justice Clarke, agreed with the lower court that the contention of the Government could not be allowed that the extra service rendered was within the paragraph of the contract providing that the contractor is "to perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster General may order in the city of Chicago, Ill., during the contract term, without additional compensation," this Court holding that the case was governed by the *Utah Stage Company Case* unless plaintiff's right of action was defeated by the fact that Travis, instead of Weighel, had performed the service. Upon this latter point this Court differed with the Court of Claims, holding that Hunt, the executor, was entitled to recover additional compensation for such extra service for the benefit of Weighel's estate. (— U. S. —, decided Nov. 7, 1921.)

As in all of the foregoing cases both the Court of Claims and this Court held that the contractor for this mail messenger or transfer service was entitled to recover full compensation for the extra or additional service which was imposed upon him that was not war-

ranted by the terms of this contract, it is difficult to understand why that Court in this case, while recognizing that the substituted service imposed upon these plaintiffs did not come within the terms of their contract, yet held that they could not recover just compensation therefor, although they performed such service under protest.

These mail transfer cases are but an illustration of the general principle that where a contractor for the Government is called upon to perform new or additional service not covered by his contract, he is entitled to just compensation for such service.

The case of *L. P. and J. A. Smith* v. *United States* (54 Ct. Cls. 119, 124), is also analogous in its facts and principles to this case at bar. In giving judgment for the plaintiffs, the Courts of Claims said:

> "The plaintiffs in this case had a contract with the Government whereby they agreed to move from a ship channel certain material, which was specifically set forth and described in the specifications attached to the petition. The defendants over the protests of the plaintiffs required them to excavate and remove material which was not included in the contract. The defendants insisted in the face of incontrovertible evidence that the material which they required the plaintiffs to excavate and remove was the material described in the specifications, and stated to the plaintiffs that if they did not remove it they would be declared defaulting contractors; that the work would be taken from them, and would be done and charged to them, and paid for from the retained percentages due the plaintiffs for work already performed, and that if these percentages were not enough to pay for the work, the plaintiffs and

> their bondsmen would be proceeded against. Under these circumstances the plaintiffs excavated and removed the material which the evidence in this case plainly shows was not the material described and specified in the contract and specifications. We think the right of the plaintiffs to recover the price for the work done by them is indisputable."

And this Court, on the Government's appeal, in an opinion delivered by Mr. Justice McKenna, sustained the contractors' right to recover. *United States, Appellant* v. *L. P. and J. A. Smith*, decided April 11, 1921 (41 Sup. Ct. Rep. 413).

II.

Railway Mail Pay Cases Distinguished.

The Court of Claims, while recognizing that the substituted service thrust upon plaintiffs by the Post Office Department by its order of June 30, 1911 (Rec., 21), was so radically different from the service advertised for by the Department and contracted for by the plaintiffs that it could not be held to come within the provision authorizing "new and additional service" provided for by plaintiffs' contract, yet held that plaintiffs were precluded from recovering any greater compensation than that stated in said order of June 30, 1911, because of the principle announced by this Court in the following Railway Mail Pay Cases:

> *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640;
> *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 198 U. S. 385;

Eastern R. R. Co. v. *United States,* 129 U. S. 391;

Northern Pacific Ry. Co. et al. v. *United States,* cited by the Court of Claims as *Kansas City, M. & O. Ry. Co.* v. *United States,* 251 U. S. 326;

New York, New Haven & Hartford R. R. Co. v. *United States,* 251 U. S. 123.

But a comparison of the facts of those cases with those of the case at bar shows that this case presents an entirely different situation from those, and that the principle relied upon by the Court of Claims as established by those cases has no application here.

In each of the Railway Mail Pay Cases cited by the Court of Claims, the Post Office Department, *unembarrassed and untrammeled by any existing contract with the railroad company concerned,* had ordered a certain service to be performed, for which the Department stipulated that it would make certain compensation. The performance of such service, under these circumstances, even though in some instances such performance was under protest, was held to bind the carrier to the acceptance of the terms proposed.

In the case at bar a very different situation is presented. The Post Office Department by its order of June 30, 1911 (Rec., 21), *acting under the supposed authority of its contract with plaintiffs,* undertook to *restate the service authorized by that contract* by substituting therefor a radically different and immensely more burdensome service not authorized by the contract, stating such substituted service by one-way instead of by circuit trips—necessarily involving a great loss of mileage—and then stating the total (estimated) annual pay based on the annual mileage so determined,

which pay was described in the order of June 30, 1911, as "being pro rata of original contract price."

In other words, in making the order of June 30, 1911, the Post Office Department was acting, and purported to be acting, in pursuance of the existing contract between the parties, and to be stating plaintiffs' compensation for the substituted service, as well as that service itself, in accordance with the terms of said contract.

There is no doubt about this because, as stated in Finding VI of the Court of Claims (Rec., 20-21), at the conference which plaintiffs had with the Second Assistant Postmaster General about June 15 to 20, they were informed that they would be required to commence work on July 1, "*under the terms of their contract*", and that a schedule of the work to be required would be furnished them, and on June 30, they received the order in question which, on its face, shows that it purports to be based on plaintiffs' contract.

Manifestly—upon the theory that the substituted service did not come within the terms of the plaintiffs' contract, and the Post Office Department was mistaken in supposing that it did—there was no agreement between the parties, express or implied, that plaintiffs should receive for said substituted service only the sum stated in said order of June 30, 1911 (which was merely an estimate), because plaintiffs expressly and distinctly protested against being required to perform said substituted service under their contract, and performed said service only under compulsion and because of the threat by the representative of the Department that their bond of $25,000 would be forfeited. Under these circumstances no agreement on the part of plaintiffs to perform the service for the amount stated in said order as "pro rata of the original contract

price," can be implied, but, following the usual rule, which is founded on justice and reason, the courts will imply, under such circumstances, that if the Post Office Department was mistaken as to the scope of its authority under the contract, and had no authority thereunder to issue said order, an agreement on the part of the Government to pay plaintiffs what the substituted service was actually worth.

This was the implication made by the Court of Claims and by this Court in the *Utah Stage Company Case*, 39 Ct. Cl. 420; affirmed, 199 U. S. 414; and in other similar decisions of the Court of Claims hereinbefore discussed, and this is the implication always made by the courts where a government contractor is ordered by the representatives of the Government to perform services subsequently determined not to be within the terms of his contract and for which he is held entitled to receive just compensation.

In order that the difference between the Railway Mail Pay Cases relied upon by the Court of Claims and this case may be readily seen, we shall briefly state the essential facts of each of those cases.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, the Post Office Department had a four-year contract with the railroad company for transportation of the mails between Chicago and Kansas City in cars of a certain size, *which contract was to expire on June 30, 1907, by limitation. Later, July 18, 1907, no new contract having been entered into,* the Department ordered the carrier to furnish a somewhat different service, requiring cars of a smaller size, which fact would reduce the pay of the railroad company, and advising the company that compensation would be made therefor only in accordance with its orders. Against this order the carrier protested, but

performed the service, although with cars of the size that had been in use under its prior written contract (and for a short time after its expiration), and claimed payment for such larger cars, accepting payment upon the basis of the smaller size cars under protest. *The authority of the Post Office Department to make the order in question being sustained,* manifestly the carrier had no legal ground of complaint.

Chicago, Milwaukee & St. Paul Ry. Co. v. *United States,* 198 U. S. 385, was a case where the Postmaster General undertook to fix the compensation for an extension upon an existing postal route, beyond the terminal of that route, by separate order. This the Court held to be within his power under the provisions of the Revised Statutes relating to the postal service, holding that the carrier was bound by its performance of the service without protest. In view of later decisions of this Court it is doubtful if protest would have availed.

In *Eastern Railroad Co.* v. *United States,* 129 U. S. 391, the facts are succinctly stated in the headnote to the case as follows:

> "Prior to the expiration, June 30, 1877, of a written contract with a railroad company for carrying the mails, the Postmaster General acting under provisions of law, notified the company in writing that *from the day of that expiration* to a day which made a term of four years, the compensation would be at rates named in the notice, 'unless otherwise ordered.' The company transported the mails, and accepted pay therefor at those rates, without objection. On the 1st July, 1878, the Postmaster General reduced the rate 5 per cent under the provisions of an act of Congress to that effect. The company made no objec-

> tion to this, and continued to transport the mails for the rest of the term of four years, and received pay therefor at the reduced rates. They then brought suit to recover the amount of the reduction made after July 1, 1878;" . . .

In *Northern Pacific Ry. Co. et al.* v. *United States*, 251 U. S. 326, the Court sustained the authority of the Postmaster General to change the method previously followed of ascertaining the average daily weights of mail (by changing the divisor, which he was held authorized to do), of which intention he duly notified the railroads *in advance of making new quadrennial contracts with them* for the carriage of the mail.

In *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, the carrier undertook to carry the mails with advance notice of the fact that the Post Office Department would ascertain the weight of mails in a certain way (by weighing them only once before the quadrennial period of its contract thereafter entered into began), and pay accordingly, which method this Court held to be authorized by the statutes of the United States.

In each and all of these cases, the Postmaster General was held to have acted within his authority, and his orders violated no contract with plaintiffs. In the case at bar, it appears that he had no authority to act as he did under his existing contract with plaintiffs in pursuance of which he was purporting to act.

These Railway Mail Pay Cases presented no such equities on the part of the contractors as are presented here. In each of those cases the railroads concerned were fully and duly apprised as to what they were expected to do and what the Department would pay. Here, these plaintiffs contracted for a certain

limited service and then suddenly and without any sufficient warning, have an entirely different service thrust upon them which they were entirely unprepared to perform.

III.

The Protests made by Plaintiffs were Sufficient.

Finding VI of the Court of Claims stated (Rec., 22):

> "Plaintiffs protested to the Second Assistant Postmaster General, to the postmaster at St. Louis, and to a Mr. Porter, a representative of the Post Office Department then at St. Louis, against being required to perform this service on the ground that it was an entirely different service from that contemplated by their contract and not within its requirements."

This protest was to the service required and went to the root of the whole order. Having been compelled, against their protests, and under threat of forfeiture of their bond, to perform the service, it was unnecessary for plaintiffs to protest the payments subsequently made. Such protests manifestly would have been of no avail. Plaintiffs were entitled to take what they could get for the service and sue in the Court of Claims for the balance at the end of the contract term. Partial payment for the service rendered was not payment in full. Having protested the order, and having acted under compulsion, they could not be held bound by its terms, the same being unauthorized by the contract.

It is to be observed that the Court of Claims while finding that the monthly payments for the substituted service were not protested, did not question the sufficiency of plaintiffs' protest against the order of July 30, 1911.

Having earnestly protested against being required to perform the substituted service, as not covered by their contract, and having been threatened with the forfeiture of their bond if they did not perform it, it ill becomes the Government to say—if the Court should hold that said service did not come within the terms of plaintiff's contract—that plaintiffs are nevertheless bound by the terms of an order purporting to fix the terms of such service in accordance with their contract, because, forsooth, although they protested against being required to perform the service, they did not protest each partial payment received on account thereof, although such protests would have been of no avail.

The courts should look at this matter in a practical way, recognizing what is to be expected of men unversed in the law in matters of this kind, and not apply technical legal rules which would result in oppressing the innocent and giving an undue advantage to the unjust and unscrupulous.

IV.

As to the $7,346.66 for which the Court of Claims gave Plaintiffs Judgment.

The findings show that the substituted service actually cost plaintiffs, without any allowance for profit, $43,726.89, and that they were paid therefor $24,289.62, or $19,437.27 less than their expenditures for such ser-

vice. Plaintiffs claimed in their Amended Petition, $34,012.90, as the balance due them on a *quantum meruit* basis for such service. This would allow them a profit of 33 1/3 per cent. on the cost to them of such service. On the service upon which they actually bid and which was later installed they made a profit of forty-two (42) per cent. on its cost (Finding IX).

While holding that plaintiffs were only entitled to be paid in accordance with the order for the substituted service of June 30, 1911, the Court of Claims gave them judgment for $7,346.66, upon the theory that their wagons had necessarily travelled 23,204.89 miles empty, for which they were entitled to be paid. In further explanation of this allowance the Court of Claims said (Rec., 27):

> "It may be added upon the question of compensation that it seems to us clear that the compensation provided for in the order of June 30, 1911, *was derived from and intended to be on the basis of the plaintiffs' contract and that contract did not contemplate any dead mileage.*"

This is exactly what plaintiffs contended before that Court and are contending here, namely, that the Order of June 30, 1911, was based, and intended to be based upon plaintiffs' contract, and in supposed accordance therewith, and if it did not conform to plaintiffs' said contract, it should be made to conform thereto or plaintiffs' pay adjusted in accordance therewith, if that be possible. If not, plaintiffs are entitled to recover on a *quantum meruit* basis.

But what the Court of Claims has done is to require that plaintiffs be paid in accordance with their contract in one respect, but not in another equally important respect. We

mean by this that if the Court of Claims was going to hold that plaintiffs were entitled to be paid for the substituted service in accordance with their contract, it ought also to have held that the trips stated in the substituted schedule by the order of June 30, 1911, should have been stated on a round-trip or circuit basis, since the trips stated in the service actually contracted for by plaintiffs were all stated upon a circuit basis. This would have resulted in doubling the mileage and likewise the pay for such service. In other words, upon this theory, plaintiffs would have been entitled to recover $24,289.62. By stating these trips on a one-way basis, the Post Office Department simply cut plaintiff's pay in two.

But even this would not be just compensation for the substituted service, because, while it would take care of the mileage, it would not take care of the additional service that plaintiffs were required to perform because of the greatly increased weight of the mail—several times the weight of that bid upon. Nor would it take care of the additional time required for the substituted service—a 24-hour service as against a 12-hour service; nor of the greater equipment required —18 wagons as against 6 automobiles of much lighter capacity.

In other words, the substituted service, being so radically different in its nature, could only properly be compensated for on a *quantum meruit* basis.

It will be noted that the Court of Claims finds that the substituted service "*necessarily*" required 23,-204.89 miles of dead mileage for which the plaintiffs received no pay. As a matter of fact there was much more, but that Court says it did the best it could on this question on the record. However, as above pointed out, dead mileage alone is only one of the elements to

be considered in determining the compensation to which plaintiffs are entitled for this substituted service.

CONCLUSION.

The judgment of the Court of Claims should be reversed and the case remanded, with instructions to enter judgment for the plaintiffs for the amount claimed in the amended petition, namely, $34,012.90.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Freund and Roemmich.

March 27, 1922.

INDEX.

100522 - 22—1

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

EUGENE A. FREUND AND ALFRED F. Roemmich, appellants, *v.* THE UNITED STATES. } No. 223.

THE UNITED STATES, APPELLANT, *v.* EUGENE A. FREUND AND ALFRED F. Roemmich. } No. 241.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF FACTS.

As the case depends, in our judgment, very largely upon its particular, peculiar facts, it is though best to state the facts from the point of view of the United States.

Prior to the time at which the appellants entered into the contract for carriage of the mails in St. Louis, which is the subject of dispute in the present cause,

the mails had been carried from the general post office at St. Louis to various railway and other stations, and from said various railway and other stations to the general post office under the usual 4-year contract at a flat rate (without diminution or increase for change in the service) for screen-wagon service, which contract would expire on June 30, 1911, so that, if performance under a new contract were not entered upon on said latter date, the city of St. Louis would be without any postal service whatsoever, a fact, of course, well known to the appellants. A new post office was under construction in the city of St. Louis, much nearer to the Union Station than the old post office, but this new post office was not in such a state of construction as to make it possible to occupy it on the first of July, 1911. When this post office was finally occupied, the nature of the mail service in the city could be changed, on account of the proximity of the new post office to the Union Station, into what is known as a circuit service rather than a trip service—that is, a service beginning at the new post office and returning thereto by way of an intermediate station. A bulletin, dated March 21, 1911, inviting proposals generally for screen-wagon mail service in the city of St. Louis, beginning July 1, 1911, including therein circular service from the new post office and returning, was issued, but the Court of Claims refused to find that this bulletin was submitted to the plaintiffs. (R. 11.) Nevertheless, it is the bulletin upon which the proposal and acceptance were based (R. 13),

and is the bulletin expressly referred to in the contract and made a part thereof. (R. 15.) [1]

It is difficult, therefore, to state accurately to this court, in so far as the findings of fact of the Court of Claims are concerned, what precisely was the advertisement or bulletin upon which the bid and contract of the appellants were based. However, it is found that, with a letter of March 21, 1911, inviting the appellants to submit a bid, there was contained a bulletin of some sort requesting a bid for regulation screen-wagon, mail station service at St. Louis, on a certain numbered route and upon a mileage basis. (R. 9–11.) In this bulletin was contained a schedule of circular trips from the new site of the post office by certain other stations and return to the place of beginning, giving the distances, the number of trips daily, Sundays, and holidays, and the running time. This bulletin also contained a "note" authorizing the Postmaster General, in the most general and extensive terms, to increase, decrease, or change the service. This note will be referred to later in connection with the stipulations contained in contracts in the cases decided by this court relied upon by the appellants. At the present moment, however, it is only desired to call the court's attention especially to the fact that this advertisement was for a mail service upon a mileage basis. In all the other cases which

[1] In the record (pp. 11, 12) the proposal is given as dated "April 4, 1910," and the advertisement upon which it is based is referred to as "dated October 1, 1911." Both of these dates are erroneous. The date of April 4, 1910, should, of course, be April 4, 1911, and it is submitted the date October 1, 1911, should be March 21, 1911.

have been before this court,[2] some of which are relied upon by the appellants, the contract was for a flat price; that is, the contractor agreed to carry the mails over a certain route for a certain amount of money, and if the Postmaster General, acting under the authority reserved to him to increase, diminish, or change the service, called upon the contractor for greatly increased labor or expense, no increased compensation could be paid to him. In the contract now before the court, however, the compensation is fixed at a certain rate per mile of mail carried, so that, if the Postmaster General, acting under the authority referred to, should under such a contract increase the service, the contractor would be entitled to increased compensation. This difference alone distinguishes the present case on its facts from all the other cases relied upon by the appellants.

After the receipt by the appellants of the request to bid and bulletin advertisement referred to above, they made a proposal to carry the mails over the route in question, subject to the requirements and conditions contained in the bulletin advertisement, for a certain sum on the basis of a certain rate per mile (R. 11, 12), and on April 20, 1911, their proposal was accepted by the Postmaster General with an express clause in his letter calling attention to the requirement of the contract that service should begin upon the route on the first day of July, this

[2] In *United States* v. *Otis*, 120 U. S. 115 (see pp. 116, 122), the contract for one of the routes was not at a flat price, but the contract which was principally discussed by the court was at such a price.

being the date at which the old contract for carriage of the mails in the city of St. Louis expired. (R. 13, 14.)

On May 22, 1911, following the advertisement, proposal, and acceptance, the appellants entered into the formal contract for carrying the mails on the route numbered, beginning on the first day of July, 1911, and ending on the 30th of June, 1915, at the rate of a certain amount of money per annum. This contract contained an express covenant, in the following language, regarding new and additional service:

> Tenth. To perform any and all new and additional service that the Postmaster General may order during the contract term, between post offices, between the post office and railroad stations, between the post office and steamboat landings, between the post office and mail stations, between the post office and the points of exchange with electric or cable cars, and between the several post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, named in the schedule of service for said route in said advertisement, and to and from other like points not named therein. Also to perform any and all additional service during the contract term that may be caused by changes of site of said post offices, railroad stations, steamboat landing, mail stations, or points of exchange with electric or cable cars.

The contract also contained a stipulation as follows:

> That the Postmaster General may change the schedule, vary, increase, or decrease the trips on this route, or extend the trips to any new location of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with cable or electric cars named in the schedule for service for said route, in said advertisement, establish service to and from like offices, stations, landings, or points not named therein, and vary, increase, or decrease the trips thereto, and discontinue service between any of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, or between any of them: *Provided*, That for any increase or decrease in the service authorized by the Second Assistant Postmaster General, the pay of the contractors shall be increased or decreased, as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel, based on the frequency and distances shown in the schedule of service for said route in said advertisement.

The contract referred to was transmitted by the appellants to the Post Office Department on May 23, 1911, in a letter in which application was made for an extension of time from July 1, 1911, to such later date as the Post Office Department might see fit to grant, but, on May 31, 1911, the appellants were advised by letter from the Second Assistant Postmaster General that the application for an extension

could not be granted but that the appellants would be expected to at once make preparation to take up the service on the first day of the contract term. It was further stated in said letter that a statement of the service as it would be in actual operation on July 1 was being prepared and would be furnished to them as soon as completed. (R. 20.) Accordingly, on June 30, 1911, the postmaster was advised as to the readjusted service to begin under the contract on July 1, and a schedule was given which was in fact the same schedule which was in force under the old contract expiring on June 30, except that the new contract was on a mileage basis, at the rate per mile agreed to by the appellants in their proposal and in the formal contract. This schedule gave precisely the places from which and to which the mails must be carried, the length of the trip in miles, the number of the trips daily, Sundays, and holidays. This schedule so stated would not cover any allowance for trips made when no mail was carried, as would be the case with a circular route such as was to be put into effect when the new post office was in operation. It is important to observe this fact carefully at the outset, on account of the judgment of the Court of Claims allowing the appellants $7,346.66 on account of trips taken when no mail was carried. Such an allowance can not possibly be justified under the schedule stated by the Post Office Department on June 30, 1911, since, as has been stated, that schedule gave the exact number of miles which were to be traveled on each

trip and the number of trips. It would, therefore, only be necessary to multiply the number of miles traveled, as given in the schedule, by the rate per mile agreed to by the appellants in the proposal and formal contract to reach the exact amount which was due the appellants under the readjusted schedule, and which was in fact, and without dispute, paid to them in full. The way in which this appears in the schedule of readjusted service is shown in the number of trips given in the schedule. For instance, there are to be 71 trips daily from the general post office to the Union Depot but only 32 trips in the opposite direction from the Union Depot to the general post office. In other words, to that extent, as the schedule clearly shows upon its face, the appellants would be compelled to carry mail to the Union Station at such times as to make it impracticable for them to carry any mail upon the return trip.

Upon receipt of the notification of the adjusted schedule, the appellants protested against being compelled to carry the mails thereunder, for the reason that it substituted an entirely different contract for the one into which they had entered. When, however, it was stated that, if they did not enter upon the performance of the contract at the time stated, they would be treated as defaulters, they proceeded with the execution of the contract.

Subsequently payments were made to them in accordance with the rate per mile fixed in their proposal and in the formal contract on the schedule of readjusted service made by the Postmaster General

on June 30, and these payments were received without protest and the contract proceeded with in this manner until the new post office was completed, at which time the appellants entered upon the circular service provided for in the schedule and performed the same to the end of the term of the contract.

These being the essential facts in the case, the appellants brought an action in the Court of Claims against the United States based solely upon a *quantum meruit*. They do not claim that the United States ever contracted to pay them any sums in addition to those which they have been paid, nor do they sue the United States for any breach of contract upon its part which has caused damage to the appellants. The claim is solely based upon the ground that, in spite of the fact that the United States consistently claimed the right to have this service performed for a certain price, the law will, nevertheless, imply an obligation upon the part of the United States to reimburse the appellants for the actual value of the services performed by them, irrespective of the contract between them and the United States, and irrespective of the insistence of the United States upon the performance of the service for a certain sum, and irrespective of the fact that the appellants entered upon the service knowing, from the very initiation thereof, that the United States would pay no more than was fixed by the adjusted schedule of June 30, 1911, and received, without protest, payments made upon the basis of such readjusted schedule.

ARGUMENT.

I.

On the appeal of Freund and Roemmich.

(*a*) The Court of Claims, while it expressed a doubt whether the service called for by the order of readjustment of June 30, 1911, was new and additional service within the meaning of the contract, did not pass upon the point, but decided the case upon the ground that no obligation to reimburse the contractors could be imposed upon the United States in the face of the positive statement of the Second Assistant Postmaster General that payment would be made only in accordance with the readjusted schedule of June 30, 1911.

It is submitted that the doubt expressed by the Court of Claims as to whether the service required was within the contract was unjustified. Every case of this character necessarily depends mostly upon its peculiar circumstances, viz, the outside conditions on the basis of which the parties act, the object had in view by the contract in question, and the particular terms of said contract. In the present case the outstanding external fact was that the carriage of the mails for the city of St. Louis had been, prior to the time of the contract in question in this case, provided for by a trip contract to and from the general post office at a certain place in the city of St. Louis, which contract expired upon the 30th of June, 1911. Unless a new contract for the carriage of

the mails was made and performance of it begun on July 1, the city of St. Louis would be without any carriage of mails whatsoever. Connected with and corollary to this external situation was the fact that a new post office, at a different site nearer to the Union Station, was under construction and would be completed at some time within the four-year period for which the mail contract was to be let, but that said new post office could not, by any conceivable contingency, be ready for occupancy on July 1, to the knowledge of all the parties concerned.

Such being the situation, as had in mind by the contractors on the one side and the Post Office Department on the other, the former, by the letter of the postmaster of March 21, 1911 (R. 9), were invited to bid upon a certain numbered route on the mileage basis, which route was described in the form of seven circuits starting from the new post office and returning thereto by way of an intermediate station; and in this notice to the contractors there was stated the annual pay under the existing contracts for the carriage of the mails in St. Louis, and that while such statement of the existing system of carrying the mails did not show the service as performed for any particular period, nevertheless it showed the service which it was thought would be necessary at the beginning of the contract term. And in order that there could be no possible mistake, under the peculiar external conditions to meet which the contract was desired, a note was attached, which had not been included in the

former advertisement submitted to the contractors (R. 11), which note, in so far as material, provided as follows:

> NOTE.—It may be necessary to either increase or decrease the trips, as shown in the foregoing statement, and to include service to and from other like points not named in said statement, or to discontinue service to and from or between points named. * * * For any authorized change in the service other than emergency service or omitted service, above referred to, the pay of the contractor will be increased or decreased, as the case may be, at the rate per mile of travel as shown by the annual rate of the proposal of the accepted bidder and the annual miles of travel based on the frequency and distances shown in the above statement of service. So much of the "Instructions to bidders" as is inconsistent with the foregoing shall not apply to the contract for service on this route.

The appellants made their proposal to enter into the contract upon the basis of this bulletin advertisement at a certain rate per mile of mail carried (R. 11), and their proposal was accepted upon this same basis, with specific notification that they must have upon the route ready for use on the first day of the contract term the full amount of equipment specified in the advertisement for the route. Thereupon a formal contract was entered into, merely amplifying the proposal and acceptance, and specifically providing that the carriage of the mails should

begin on the first day of July, 1911. In regard to new and additional service, the provision contained in the note to the bulletin sent to the contractors was amplified as follows:

> Tenth. To perform any and all new and additional service that the Postmaster General may order during the contract term, between post offices, between the post office and railroad stations, between the post office and steamboat landings, between the post office and mail stations, between the post office and the points of exchange with electric or cable cars, and between the several post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, named in the schedule of service for said route in said advertisement, and to and from other like points not named therein. Also to perform any and all additional service during the contract term that may be caused by changes of site of said post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars.

Moreover, the contract contained the following stipulation on the same subject:

> That the Postmaster General may change the schedule, vary, increase, or decrease the trips on this route, or extend the trips to any new location of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with cable or electric cars named in the schedule for service for said

route, in said advertisement, establish service to and from like offices, stations, landings, or points not named therein, and vary, increase, or decrease the trips thereto, and discontinue service between any of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, or between any of them: *Provided*, That for any increase or decrease in the service authorized by the Second Assistant Postmaster General the pay of the contractors shall be increased or decreased, as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel, based on the frequency and distances shown in the schedule of service for said route in said advertisement.

As stated above, and as known to all the parties concerned, the new post-office site could not be occupied by July 1, 1911, and was not in fact occupied for handling of the mails until October, 1912. On account of this, it became necessary, if the mails were to be carried in St. Louis at all, to provide for a new and different service in the interim under the authority of the stipulations contained in the paragraphs of the contract quoted above. Accordingly, on June 30, 1911, the Post Office Department readjusted the service in the form of a trip service to and from the old post office, leaving, however, the payment for the service the same as in the proposal and contract, viz, at a certain rate per mile of mail carried.

It is only necessary to add that, in spite of a request by the contractors for an extension of the time, and in spite of their protests against entering upon the performance of the work under the readjusted schedule of June 30, 1911, the responsible authorities of the Post Office Department consistently and positively declined to extend the time of performance, and insisted that the contractors should enter upon the performance of their contract, in accordance with its terms, on July 1, 1911.

Under these circumstances it seems difficult to understand how the appellants can claim that there was any variation from the true intent and meaning of their contract, by requiring them to perform the contract at the rate stated by them over trip routes to and from the old post office.

Two theories of the matter may conceivably be advanced on behalf of the contractors:

(1) It may be claimed that their contract in truth meant that they would carry the mails in St. Louis only when the new post office was completed and in use, no matter when that time might occur.

If that be the theory of the appellants, the answer to it is that, for all useful purposes, their bid might just as well have been to carry the mails to the moon. The new post office, to the knowledge of every person, could not be in use by the first of July nor until some considerable period thereafter. They knew that the contract for the carriage of the mails in St. Louis expired upon the 30th of June, and that if the new contract were not entered upon

immediately, a necessary function of the Government in a large city of the United States would be absolutely abandoned. To say that they contemplated that the mails in St. Louis should not be carried by any person between June 30 and the time when the new post office was in use is to utter nonsense. They bid to carry the mails on the first of July, 1911, knowing full well that at that time the old contract would have expired with no alternative provision in its place, and that the carriage must be from the old post office, since the new post office was not completed. It is, therefore, nothing but the dictate of common sense that their contract contemplated a carriage of the mails from the first of July to and from such stations as the conditions of the service, honestly determined by the Postmaster General, required. There seems to be no escape from the conclusion that any theory to the effect that the appellants were not compelled to carry the mails on July 1, 1911, unless the new post office was then completed, is absolutely without support in reason or law.

(2) It may be said that the appellants contemplated carrying the mails to and from the old post office under conditions of service similar to those which had prevailed before, but that they did not contemplate beginning such service so soon as July 1, and not until they had procured their equipment. This, indeed, seems to have been the only theory ever put forward by the contractors themselves, for

in their letter of May 23, 1911, to the Second Assistant Postmaster General, in which they transmitted the contract (R. 19), they merely stated that, finding it to be necessary, they thereby made application for extension of time from July 1, 1911, to such later date as the department might see fit to grant them. There is here no claim that their contract contemplated nothing but a circuit trip from the new post office, but merely a claim that service from the old post office should be postponed for a limited period. But clearly such a claim, merely that performance under the contract should be delayed, can not furnish a basis for the claim made in the petition, nor, indeed, for any claim whatsoever. The proper officials of the Post Office Department declined to agree to the request for an extension of time, and since the contract itself expressly provided, as did the advertisement, proposal, and acceptance, that service should begin on July 1, 1911, there is no conceivable rule of law which will permit the appellants to vary the contract and to claim compensation in direct violation of its terms. Some stress is laid in the record upon the fact that the postmaster at St. Louis advised the contractors that they would not have to begin service on July 1, 1911, and, again, that the matter would be adjusted; but the conclusive answer to this is that the postmaster at St. Louis had no authority whatsoever to bind the United States to a variation of the written contract between it and the appellants. If authority be needed for

this proposition, it will be found in the decision of this court in *Slavens* v. *United States*, 196 U. S. 229, 238.

The service required by the adjusted schedule issued by the Post Office Department on June 30, 1911, was justified by the provisions in the note to the bulletin on which the contractors bid, and by the paragraphs quoted above of the formal contract entered into by them. The language of this note and these paragraphs is materially different from the language of the contracts in the cases mainly relied upon by the appellants, viz, *United States* v. *Stage Company*, 199 U. S. 414, and *Hunt* v. *United States*, decided by this court November 7 last, just as the facts and circumstances of the present case are different from the facts and circumstances of those two cases. In the *Stage Company case* the clause in the contract relating to new and additional service was as follows (199 U. S. 416):

> To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail station service that the Postmaster General may order at the city of New York, N. Y., during the contract term, without additional compensation, whether caused by change of location of post office, stations, landing, or the establishment of others than those existing at the date hereof or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance or extra wagons from time to time for special or advance trips as the Post-

master General may require as a part of such new or additional service.

The corresponding clause in the *Hunt case* was in precisely the same language. The corresponding clauses in the advertisement and contract in the present case differ, however, materially from the clauses in the contracts in the *Stage Company* and *Hunt cases*, in that they expressly provide that the Postmaster General may include service to and from other like points not named in the schedule, and discontinue service to and from the points named; while the contract itself (R. 17) has the express provision that the Postmaster General may change the schedule, may extend the trips to any new locations of the post offices, may establish service to and from like offices or stations not named therein, and discontinue service between any post offices and other stations. Most important of all, as distinguishing this case entirely from the *Stage Company* and *Hunt cases*, the contract expressly provided that if the change made by the Postmaster General resulted in increased service on the part of the contractor his pay should be correspondingly increased. We say that this is important, because the court in the *Stage Company* and *Hunt cases* was evidently much impressed by the injustice of requiring the contractors to perform large additional service without any increase in the compensation, and was therefore inclined to construe the contract as not contemplating such an increase by the clauses

relating to new and additional service. In the present case, however, no such inference can be drawn, since the parties may very well have contemplated a large change or increase in the service, so long as the contractor should be justly compensated for any increased cost arising from such change or increase. As has been said above, the particular change made in the present case, viz, the change from circuit trips around the new post office to ordinary trips to and from the old post office, was clearly in the contemplation of the parties, since, from the circumstances existing on the ground, performance of the contract on July 1, 1911, was impossible upon any other basis. Since the parties must, in the nature of things, have contemplated such a change, and since they expressly provided for compensation adjusted to the changed service according to the rate per mile bid by the contractors, the only possible construction of the language of the advertisements and contracts referred to and quoted above is that they explicitly included the change in service made by the order of June 30, 1911. That being so, the order was justified, and the appellants can not complain nor assert any right of action in the nature of a *quantum meruit* therefrom.

(*b*) If the doubt expressed by the Court of Claims as to the construction of the clause in the contract covering new and additional service be justified, the result, in so far as the appellants are concerned, is the same. The situation would then be that the United

States, after the contract had been entered into, but before performance of it had begun, put forward, in good faith, a construction of the contract upon which basis alone it would consent to the carriage of the mails by the appellants. Whether that claim was justified or not as a matter of law, it at any rate had sufficient basis to bring it colorably within the terms of the contract. Some suggestion is made in the brief on behalf of the appellants that the circumstances under which this claim was asserted against the appellants amounted to duress. This claim, however, can not possibly be maintained, since nothing was done by the postmaster at St. Louis or by the representative of the Post Office Department which in any way prevented the appellants from exercising their own judgment and will as to their future course of conduct. In so far as any question of duress is concerned the case is governed by the decision of this court in *New York, New Haven & Hartford R. R.* v. *United States*, 251 U. S. 123, 127, since the choice offered to the railroad company in that case can not, in substance, be distinguished from the choice offered to the appellants in the present case.

The United States having thus asserted to the appellants its construction of the contract, and advised them as to the only terms upon which it would permit the carriage of the mails by them, and this having been done before the performance of the contract had been entered upon in any way what-

soever, the appellants clearly had a legal right to refuse performance upon the terms asserted by the United States, and to rely upon their judicial remedies. It was not a case where the contractor, having entered upon the performance of the contract, is notified, while engaged in the performance, of a claim on behalf of the other party which, in his judgment, is in violation of the contract (in which case the contractor might have no right to repudiate the contract and refuse absolutely to perform); but it is a case where, at the very threshold of performance, and before the contractor had entered upon the work, a distinct and positive claim is asserted on behalf of the other party which, if unfounded and unjustified by the contract, gives the contractor an undoubted right to refuse to proceed.

In that situation it is well settled that if the contractor, in spite of his assertion as to the illegality of the claim and irrespective of his protests, nevertheless entered upon the performance of the contract, distinctly understanding the terms proposed by the other party as the only terms upon which performance will be accepted, the law imposes no obligation upon the other party to reimburse the contractor for expenses incurred in excess of those which the other party distinctly stated as the limit of his liability.

The law is succinctly stated to this effect by the Supreme Court of Massachusetts in *Keith* v. *DeBussigney*, 179 Mass. 255, 259, 260:

> The rule is that one can not be held liable on an implied contract to pay for that which he declines to permit to be done on his account. The exception to the rule is that when the law imposes upon one an obligation to do something which he declines to do, and which must be done to meet some legal requirement, the law in some cases treats performance by another as performance for him, and implies a contract on his part to pay for it. A familiar illustration of this is seen when the law holds one liable for necessaries furnished to his wife, if he has without cause refused to provide for her; but there is no such obligation upon one to retain and preserve his property, whether it be live animals or anything else. He may destroy or abandon it, provided he does not thereby imperil the person or property of another.

(See also *Thompson* v. *Sanborn*, 52 Mich. 141; *Whiting* v. *Sullivan*, 7 Mass. 107, 109; *Jewett* v. *Somerset*, 1 Maine 125, 129; *Meaher* v. *Pomeroy*, 49 Ala. 146; *Municipal Water Works* v. *City of Fort Smith*, 216 Fed. 431, 437, 438.)

This doctrine is peculiarly applicable to contracts, such as the one involved in the present case for the carrying on of a public function, since the law is strict as to implying an obligation against a sovereign, in excess of the terms agreed upon by its duly constituted officers. (See per Lamar, J., in *Atchison Railway* v. *United States*, 225 U. S. 640, 649.) The Court of Claims applied the above rule to the present

case, and also held that this court had applied it to the same character of case in its decisions in *Eastern R. R. Co.* v. *United States*, 129 U. S. 391; *C., M. & St. P. Ry. Co.* v. *United States*, 198 U. S. 385; *Atchison Railway* v. *United States*, 225 U. S. 640; and *New York, New Haven & Hartford Railroad* v. *United States*, 251 U. S. 123, and we call attention in addition to the decision of this court in No. 96, of the present term, *New York, New Haven & Hartford R. R. Co.* v. *United States*, in which it was held that, if articles not properly the subject of carriage by mail are tendered and accepted as mail matter, the carrier can not recover additional compensation upon the theory of a *quasi* contract.

It is submitted that the decisions quoted above and relied upon by the Court of Claims are completely decisive of the present case, and the attempt to distinguish them in the brief of the appellants is without success. It is true that in those cases the railroad company was under no obligation to carry the mails at all, since no contract had as yet been entered into binding upon it, and this court held that, since the railroad company had the right to refuse performance, it could not perform and claim compensation upon any other basis than that tendered to it before performance by the Postmaster Gereral; but that is the very situation in the case at bar, assuming that the adjusted schedule of June 30, 1911, was not justified by the terms of the contract (as we claim it was). If this schedule was not

justified by the contract, then, since the United States refused to proceed with the contract upon any other basis, there was in effect no operative contract between the parties, and the claim was made before performance had been entered upon by the contractors. The contractors in the present case, therefore, had the same right as the railway companies in the cases referred to to decline to carry the mails and to stand upon their rights. Having failed to do this and having entered upon performance after being notified as to the only terms upon which the United States would accept performance, the case is precisely like the railway mail cases referred to above, and is governed by them.

The appellants, in their brief, also claim that in the railway mail cases referred to above this court held that the claim of the Postmaster General was justified, and that the cases were in reality placed upon that ground. It is true that in some of the cases this court may have considered the claim of the United States to be justified by law. Nevertheless the decisions were placed upon the ground that, whether the claim was justified or not, the railway companies could not recover, on a *quantum meruit*, sums in excess of those stated by the Postmaster General as the only sums which would be paid for the carriage of the mails under the circumstances of the case.

The appellants also rely largely upon certain cases in the Court of Claims and in this court, and particu-

larly the cases of *United States* v. *Stage Company*, 199 U. S. 414, and *Hunt* v. *United States*, No. 38 of the present term, decided November 7 last. The distinction between these cases and the present case is, however, clear. In the first place, in those cases the contractor had entered upon the performance of the contract, and the claim of the United States, which was adjudged to be unjustified, was made while performance of the contract was in progress. Under those circumstances, it is at least doubtful whether the contractor had any right to refuse performance and abandon the contract. Ordinarily such a right is not given to one party to a contract unless the illegal acts of the other party go to the essence of the contract, or cause a breach of some condition precedent. A mere claim by the United States that certain additional service must be performed under the contract would not necessarily go to the essence of the contract, nor constitute a breach of any condition precedent, so that the contractor in such a case might have no right to abandon the performance of the contract and stand upon his rights, but might be compelled to continue the performance, with the right to recover damages for any loss suffered by him by reason of the illegal claim. In the present case, however, as in the railway mail cases referred to above, the claim of the United States, which is alleged to have been unjustified by the contract, was made before performance was entered upon, and constituted, therefore, if unjustified, a complete breach of the

contract *in limine*, so that the contractor had a clear and fixed legal right to refuse performance altogether, and the choice was distinctly presented to him between doing that and proceeding with the performance upon the only terms upon which the United States would consent to accept it.

In the second place, the contracts under consideration in the *Stage Company* and *Hunt cases* were all contracts for a flat rate, with an express provision that if the service was increased or decreased the compensation should, nevertheless, remain unchanged. In other words, in the *Stage Company* and *Hunt cases*, if the claim of the United States was acceded to, the contractor would have performed large additional services without any increase in compensation, and the United States, therefore, might very well be said to have obtained, by the work and labor of the contractor, an unjust enrichment, which could be made the basis of an action in *quasi* contract. In the present case, however, the contract was not upon a flat price basis, but was upon the basis of a certain rate per mile, with an express provision that if the service was increased the compensation should be increased at the contracted rate per mile. With this provision in the contract there is no basis for a claim that the United States is unjustly enriched if additional service be demanded, no matter what its extent. Normally the provision for increase in the compensation, where the service is increased, would cover the entire loss to the contractor; and if, as in the present case,

this provision be not sufficient to do that, the only inferences can be either that the contractor improvidently entered into the contract or that he carried it out in an inefficient manner.

It is submitted, therefore, that, both on reason and authority, a claim for recovery on *quasi* contract in the case at bar can not be maintained.

II.

On cross appeal of the United States.

The Court of Claims rendered judgment against the United States in the amount of $7,346.66 (R. 24), being the mileage necessarily traveled by the appellants in the performance of the readjusted service fixed by the schedule of June 30, 1911, for the 16 months beginning July 1, 1911, over which they did not in fact carry any mail. The only reason given by the Court of Claims for this decision (so far as we can see) is the following (R. 27):

> It may be added upon the question of compensation that it seems to us clear that the compensation provided for in the order of June 30, 1911, was derived from and intended to be on the basis of the plaintiffs' contract and that contract did not contemplate any dead mileage.

This conclusion of the Court of Claims seems to be clearly inconsistent with the rest of its opinion, and to be entirely incorrect if the main part of its opinion be sound. Assuming, as we must assume for the

purposes of the cross appeal, that the appellants, if they chose to enter upon the performance of the contract, were bound by the adjusted schedule of June 30, 1911, the only question is as to the construction of that schedule. It appears on page 21 of the record. It states specifically the terminus *ab quo* and the terminus *ad quem* in the case of each trip, it states the length in miles of each trip, it states the number of trips daily, the number of trips Sundays, and the number of trips on holidays, and the additional trips a week. The payment for this service is stated to be pro rata of the original contract price; that is to say, the mileage stated in the adjusted schedule is to be paid for at the rate per mile agreed to by the appellants in their proposal and in the formal contract. The amount, therefore, which the appellants were entitled to be paid under the adjusted schedule of June 30, 1911, is a mere question of mathematics—a multiplication of the number of miles traveled in the stated trips by the rate per mile agreed to in the proposal and contract—and there is absolutely no dispute that the appellants were paid in full for the mileage covered by the schedule at the rate fixed in the contract. Therefore, there is absolutely no room for any inference as to additional pay, or for the imposing of an obligation upon the United States to pay anything in excess of the readjusted schedule of June 30. The Court of Claims had already decided, and rightly decided, as has been argued above, that the appellants, if they chose to enter upon perform-

ance of the work, could only do so upon the terms stated by the Postmaster General as to new and additional service. The Court of Claims, therefore, had adopted the schedule of June 30, 1911, as the only basis upon which the appellants could carry the mails in the city of St. Louis. To adopt that schedule as the principal basis of the decision and then reject it as to the amount of compensation to be paid is to honor it in nothing but the breach. No argument can make this any clearer, since it is only necessary to take the schedule itself and apply its terms in connection with the rate per mile agreed upon in the contract.

CONCLUSION.

The appeal of the contractors should be dismissed, the cross appeal of the United States should be granted, and the judgment modified to one dismissing the petition, and as such affirmed.

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